

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

SUFFOLK COUNTY

No. SJC-12431

COMMONWEALTH

v.

MELISSA PFEIFFER

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BRIEF AND RECORD APPENDIX FOR MELISSA PFEIFFER  
ON APPEAL FROM THE SUFFOLK COUNTY SUPERIOR COURT

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**ISSUES PRESENTED**

1. Whether there was sufficient evidence to convict Ms. Pfeiffer of arson where she neither intentionally burned the dwelling nor intentionally and maliciously failed to extinguish or report the fire.
2. Whether the arson statute criminalizes the failure to report a negligently set fire and, if so, whether the Commonwealth waived that theory when it told the court it was proceeding only on the theory that Ms. Pfeiffer intentionally set the fire. If the Commonwealth was permitted to proceed on the failure to report theory, whether the jury should have received a specific unanimity instruction.
3. The court instructed the jury that arson is inherently dangerous, precluding them from finding that the arson was not committed with a conscious disregard for the risk to human life. Should the second degree felony-murder conviction be reversed on constitutional grounds because it calls for an enhanced penalty based on a judicially determined fact and is disproportionate to the malice found by the jury?

Moreover, Ms. Pfeiffer presented significant evidence that she did not consciously disregard a known risk. As this was her only defense to felony-murder if found guilty of arson, did the court's instruction improperly deprive her of this defense?

Should this conviction be vacated, may the Commonwealth retry her on the theory of third prong malice?

4. Does the Commonwealth have a duty to instruct the grand jurors regarding the elements of the offense if defense counsel so requests?

#### **STATEMENT OF THE CASE**

In February 2016, Melissa Pfeiffer stood trial (Sanders, J., presiding) on one count of second degree murder, G. L. c. 265, § 1, one count of assault and battery by means of a dangerous weapon (ABDW) causing serious bodily injury, G. L. c. 265, § 15A, one count of arson, G. L. c. 266, § 1, and two counts of injuring a firefighter, G. L. c. 265, § 13D½. R:24-28.<sup>1</sup> The court entered a required finding of not guilty on the ABDW, and the jury found Ms. Pfeiffer guilty on the four remaining offenses. R:19-20. The jury convicted Ms. Pfeiffer of second degree murder on a felony-murder theory only. R:186.

Ms. Pfeiffer was sentenced to life in prison with the possibility of parole after fifteen years on the conviction for second degree murder, with concurrent three to five year sentences for the injuring a

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<sup>1</sup> References to the record are abbreviated as listed below and followed by the page: MTD is the transcript from the March 12, 2013, hearing on the motion to dismiss; T1, T2, T3, T4, T5, T6, T7, and T8 are the transcripts from the January 28-29, February 1-4 and 9-10 jury trial dates; R is the Record Appendix.

firefighter convictions. R:20-21. The arson count was dismissed as duplicative. R:21.

Ms. Pfeiffer filed a timely notice of appeal on March 31, 2016. R:196. The case was entered in the Appeals Court on March 30, 2017. This Court granted direct appellate review and the case was entered in this Court on November 16, 2017.

### **STATEMENT OF FACTS<sup>2</sup>**

#### ***Evidence Presented at Trial***

Melissa Pfeiffer was sexually abused by both of her biological parents starting when she was two years old. T7:121, 125. She had her first psychiatric hospitalization at age three. T7:121. She was then removed from her home and she entered the foster care system. T7:125.

While in foster care, Ms. Pfeiffer went through a number of placements. T7:127. Unfortunately, her excessively sexualized and self-injurious behaviors intensified during this time. T7:127-128. She was adopted at one point, but by the age of twelve, she was abandoned by her adoptive parents and became a ward of the state. T7:129. Between the ages of twelve and eighteen, Ms. Pfeiffer was bounced around between foster homes, group homes, and hospital programs. T7:129-130.

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<sup>2</sup> Additional facts are presented as they arise in the argument section.

At eighteen, she was released from foster care and became homeless. T7:130. At this time, Ms. Pfeiffer took up with various transient men who were physically and sexually abusive. T7:131. Although she was in therapy, it was inadequate; Ms. Pfeiffer was unprepared to function independently. T7:130-131.

As a result of her years of trauma, Ms. Pfeiffer suffers from post-traumatic stress disorder (PTSD). T7:146, 154. She experiences a lot of emotional turmoil and is psychologically numb. T7:147, 149. She is introverted, has a flat affect, and lacks the ability to experience positive emotions. T7:147-148. She is disorganized and impulsive. T7:147.

People who have experienced severe trauma have a tenuous hold on reality. T7:144. They are not sure what is real and what is not. T7:144. A common characteristic of traumatized individuals is that they react to exciting circumstances in a different way than a regular person would; for instance, they might look non-reactive or aloof. T7:149.

Ms. Pfeiffer has also been diagnosed with borderline intellectual functioning. T7:154. Her IQ is seventy-one, which is two standard deviations below average and is in the third percentile. T7:133. Ninety-seven percent of all adults have a higher IQ than Ms. Pfeiffer. T7:133. Below seventy is considered intellectually disabled. T7:133-134.

This IQ score was a composite from four tests. T7:134. One test measured perceptual reasoning, the ability to process complex visual spatial information. T7:136. In this regard, Ms. Pfeiffer has a substantial cognitive deficit, scoring in the first percentile. T7:136. Thus, in her ability to visually process what is going on around her, she is in the intellectually disabled range. T7:136-137.

On another component, processing speed, Ms. Pfeiffer scored almost as low as she did on perceptual reasoning. T7:139. She is a very slow processor; it takes her a long time to process information. T7:139. Her working memory is low average. T7:139. She is also in the low average range for verbal abilities, so she has the appearance of understanding more than she does. T7:135, 139-140.

It was the opinion of defense expert Dr. Frank DiCataldo that Ms. Pfeiffer's cognitive deficits and mental disorder impaired her ability to fully appreciate and understand the circumstances of her acts. T7:155. He testified that she was "not able to fully appreciate or think through the consequences of her acts, make links between cause and effect, understand what risks and consequences could flow from her acts." T7:156.

Given her limited capabilities, on December 24, 2010, when Ms. Pfeiffer lit a piece of paper and used



that paper to set her boyfriend's (William Brewer's) clothes on fire in their apartment, she was unable, in the expert's opinion, to anticipate the consequences of these actions. T5:35; T7:160. She had set his clothes on fire before, but it had never gone that far. T4:99; T5:213.

Ms. Pfeiffer set Mr. Brewer's clothes on fire because she was angry at him; it was not her intention to burn the apartment. T5:32; T7:157. The clothes were in a bag on the floor of the apartment they shared with their youngest son. T4:162, 186. The two had another son, but Ms. Pfeiffer had to give up custody of him due to previous homelessness. T4:216-218; T5:84. Without this apartment, which held all of her belongings in the world, she was in danger of losing custody of her younger son as well. T4:221-222.

When the smoke got really bad, Ms. Pfeiffer left her apartment and ran outside, closing the door behind her. T4:193-194; R:95. She closed the door behind her because she had been taught in school when there was a fire drill to close all of the doors and windows. R:80. The door locked automatically behind her and she did not have a key. R:107-108. She had to get out so fast (she was later treated for smoke inhalation and a burnt finger) that she did not even think about picking up her phone, which was still in the apartment. R:95; Ex. 12; T8:66.

After Ms. Pfeiffer came running out of the apartment, she just stood outside. T4:193-194. Mr. Brewer walked up to her; she told him the house was on fire. T4:90; R:80. Moises Perez and Tiana Fonseca were driving by the building and saw the fire. T4:87-88. They stopped the car and went to the door while Ms. Fonseca was on the phone with 911. T4:89. At some point, Ms. Pfeiffer became aware that they had called 911. R:108. She looked really scared and really worried. T4:107.

By the time the firefighters arrived, the fire was quite advanced,<sup>3</sup> though no accelerant was used. T4:147; T5:124-125. When Ms. Pfeiffer left the apartment, she did not knock on any doors; she did not hear anyone next door and the people upstairs usually went out at night so she did not know if they were home. R:95.

But they were home. And those two people were trapped on a landing on the second floor of the building, unable to go down the stairs because the fire was too intense and unable to go back into their apartment because they had closed the door behind them as they left. T4:41. Mr. Perez kicked down the outside door to try to help, to no avail. T4:77. One man, who was able to jump out the window, was very severely

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<sup>3</sup> Two firefighters were injured due to the strength of the fire. T3:160; T4:155.

burned as a result of the fire and badly injured from the jump. T4:47-50. His girlfriend remained trapped, and she died from smoke inhalation and thermal injuries. T4:47; T7:65.

***Defense Counsel's Request for Grand Jury Instructions***

Prior to indictment, defense counsel wrote a letter to the Commonwealth, asking the prosecutor to instruct the grand jurors on the elements of felony-murder and arson. MTD:8; R:31, 50. The Commonwealth refused to do so, reading only the statutory language. R:33; MTD:17. Later, defense counsel moved to dismiss the indictments because the grand jury was not instructed on the elements. R:31. That motion was denied. R:29, 52.

***Motion for Bill of Particulars***

Prior to trial, defense counsel filed a motion for a bill of particulars in order to determine the nature of the case against Ms. Pfeiffer. R:53. At the October 13, 2015, hearing on this motion, the Commonwealth notified defense counsel and the court that it was proceeding on a felony-murder theory of second degree murder, and the theory of arson was that Ms. Pfeiffer "intentionally set the fire." R:116-117. The Commonwealth unambiguously stated that it would not proceed on the theory of arson that Ms. Pfeiffer had failed to report the fire. R:117. After the judge

confirmed the Commonwealth's position, he ruled that no further particulars were required. R:53; R:117.

***Jury Instructions***

By February 9, 2016, the Commonwealth filed its proposed jury instructions, but did not request the supplemental model instruction for arson which allowed the jury to convict for failing to report the fire. R:134, 159-161. The judge brought it up at the instruction conference, *sua sponte*, and the Commonwealth then requested that the supplemental instruction be given. T7:204, 209. Defense counsel objected, stating that the Commonwealth had waived that theory and there was insufficient evidence of that theory. T7:204-205. He reiterated this objection the next day, both before and after the instructions were given. T8:24, 124. Nevertheless, the judge instructed the jury that it could convict on this basis. T8:98.

Defense counsel twice requested a specific unanimity instruction for arson which would require the jury to be unanimous as to the theory of arson. T7:213-214; T8:26-27. The court twice refused. T7:213-214; T8:26-27. The court also instructed the jury that arson was inherently dangerous, over defense counsel's repeated objections. T7:224-225; T8:24, 108, 124. R:173 (defendant's requested jury instructions on conscious disregard).

**SUMMARY OF THE ARGUMENT**

1. The evidence did not support an arson conviction on either theory of arson presented to the jury; Ms. Pfeiffer neither intentionally burned the dwelling nor intentionally and maliciously failed to report the fire. If there is sufficient evidence to support one theory, but not the other, a new trial is still required because it is unknown on which theory the jury convicted. (Pp. 12-16)

2. The failure to report a negligently set fire is not arson - not under the statute nor at common law. But even if it is, the jurors should not have been instructed that they could convict on that theory because it was waived. The Commonwealth disclaimed that theory when it told the court it was only proceeding on the theory that Ms. Pfeiffer intentionally set the fire. Its last minute request to instruct the jurors on the failure to report theory prejudiced Ms. Pfeiffer. However, if the jury was properly instructed on the failure to report theory, the jury should have received a specific unanimity instruction as well, because one cannot both intentionally and negligently start a fire. (Pp. 16-29)

3. It was improper for the court to instruct the jury that arson is inherently dangerous. So doing was unconstitutional because this is a required element

for a felony-murder conviction and without it, the maximum sentence Ms. Pfeiffer could have received was twenty years for arson. With the judge's finding of inherent dangerousness, she then faced a life sentence. Any element that increases a defendant's potential punishment must be found by the jury, beyond a reasonable doubt. Without a jury finding that Ms. Pfeiffer consciously disregarded the risk to human life, her conviction is also unconstitutionally disproportionate to the intent found by the jury. (Pp. 29-45)

Moreover, where Ms. Pfeiffer's defense was that she did not consciously disregard a known risk, the judge's instruction that arson is inherently dangerous erroneously and prejudicially deprived her of that defense. Finally, should this conviction be vacated, the Commonwealth cannot retry Ms. Pfeiffer on the theory of third prong malice because the evidence was insufficient as a matter of law on that ground. (Pp. 45-49)

4. Where, as here, defense counsel asked the Commonwealth to instruct the grand jury on the elements of felony-murder and arson, the Commonwealth had a duty to do so. (Pp. 55-59)

**ARGUMENT**

**I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE ARSON CONVICTION.**

The jury was instructed on two theories of arson: 1) intentionally burning a dwelling; and 2) negligently starting a fire but then intentionally and maliciously failing to extinguish or report it. T8:97-98. Assuming that the statute even criminalizes the second theory,<sup>4</sup> the evidence did not support a conviction under either one. See *Commonwealth v. Swafford*, 441 Mass. 329, 339 (2004) (on appeal, court considers whether evidence sufficient to persuade “a rational jury beyond a reasonable doubt of the existence of every element of the crime charged”). See *Jackson v. Virginia*, 443 U.S. 307, 318-319 (1979). See also U.S. Const. amend. XIV; Part II, c. 1, § 1, art. 4 of the Massachusetts Constitution; Massachusetts Declaration of Rights, arts. 1, 10, 12. The arson conviction must be vacated and a finding of not guilty entered.<sup>5</sup>

**A. Ms. Pfeiffer Did Not Intentionally Set Her Dwelling on Fire.**

To obtain a conviction under the first theory of arson, it is not enough for the Commonwealth to show that Ms. Pfeiffer intentionally set a fire. The

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<sup>4</sup> It does not. See Section II(a).

<sup>5</sup> Because the felony-murder and injury to a firefighter convictions are predicated on the arson, they must also be vacated.

Commonwealth must prove that Ms. Pfeiffer intentionally set a fire with the intent to burn the dwelling. See *Commonwealth v. Dung Van Tran*, 463 Mass. 8, 16 (2012) (jury properly instructed defendant had to intend to burn apartment). In the light most favorable to the Commonwealth,<sup>6</sup> the evidence demonstrated that Ms. Pfeiffer purposefully lit a piece of paper on fire and used it to set fire to a pile of clothes in her apartment. T5:35. She did this because she was angry at her boyfriend. T5:32. The Commonwealth itself argued that this is how the fire started. T8:54-55.

However, the fact that the fire then consumed the building does not mean that Ms. Pfeiffer is guilty of arson. See *Commonwealth v. Dung Van Tran*, 463 Mass. at 16, citing J.R. Nolan & L.J. Sartorio, CRIMINAL LAW § 424 (3<sup>rd</sup> ed. 2001) (accidental fires are not arson). There was no evidence of an accelerant. See *id.* (use of accelerant relevant to intent). Ms. Pfeiffer had previously set clothes on fire in her apartment without burning the building. T4:99; T5:213.

In closing, the Commonwealth claimed that the fact that the fire was advanced and that Ms. Pfeiffer did not report the fire proved she burned the building

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<sup>6</sup> See *Commonwealth v. Latimore*, 378 Mass. 671, 676-677 (1979) (stating standard for reviewing denial of motions for required findings). Defense counsel twice moved for a required finding of not guilty on the arson indictment prior to the verdict and also moved for a post-verdict required finding of not guilty. T7:69, 186; R:184-185, 190.



on purpose, but that conclusion does not follow from these facts. T8:56, 66. The Commonwealth argued that the fact that Ms. Pfeiffer suffered burns and smoke inhalation proved that she intentionally let the fire burn. T8:66. To the contrary, the fact that Ms. Pfeiffer was still in the apartment while the fire was raging demonstrates that she was caught off-guard by the intensity of the fire. Had she intended to burn down the building, she surely would have left much earlier. Her lack of intent was further supported by Ms. Fonseca's testimony that Ms. Pfeiffer was really scared and really worried. T4:107.

As to the failure to report, Ms. Pfeiffer did not have her phone on her, because when she left the apartment the smoke was getting so bad she did not even think about bringing her phone. R:95. This, too, indicates a lack of planning. Moreover, at some point, she became aware that someone else had called 911 (R:108); there was no need to make a duplicative report.

**B. Ms. Pfeiffer Neither Willfully Nor Maliciously Failed to Extinguish or Report the Fire.**

The evidence was also insufficient to prove that Ms. Pfeiffer intentionally and maliciously failed to extinguish or report the fire. First, as stated above, Ms. Pfeiffer learned that the fire had already been reported. R:108. Second, negligence in the emergency

of the moment is not the same as harboring intent. See *Commonwealth v. Cali*, 247 Mass. 20, 25 (1923).

In *Commonwealth v. Levesque*, 436 Mass. 443 (2002), the following evidence was sufficient for a grand jury to find probable cause that the failure to report a negligently set fire was intentional and reckless: 1) the defendants possessed a cell phone; 2) they passed several stores and had multiple opportunities to call for help; 3) they went shopping and ate a meal calmly, demonstrating they were not panicked; and 4) they were trespassing where the fire was set and had a motive not to report the fire. *Id.* at 453. In contrast, Ms. Pfeiffer had no phone on her, was scared and worried, had not left the scene, told Mr. Brewer of the fire, and had no other opportunity to make a report. Indeed, all of Ms. Pfeiffer's belongings were in the apartment and she knew she could lose her son if she did not have a place to live. T4:221-222. Ms. Pfeiffer had every reason to report this fire and any failure on her part to do so was not intentional or malicious. The evidence on this theory was insufficient as well.

**C. If This Court Finds There Is Evidentiary Support for One Theory of Arson, but Not Both, the Convictions Must Be Reversed.**

If this Court finds that there was sufficient evidence on one of the aforementioned theories, a new trial is still required. "It is well established in

this Commonwealth that a verdict cannot stand unless it appears that the jury reached their verdict on a theory for which there was factual support."

*Commonwealth v. Plunkett*, 422 Mass. 634, 635 (1996) (collecting cases). If two theories of an offense are submitted to the jury for their consideration, but only one has evidentiary support, and it is unknown which theory the jury adopted, a new trial is required. See *Commonwealth v. Williams*, 450 Mass. 894, 898 (2008), citing *Commonwealth v. Rolon*, 438 Mass. 808, 819-820 (2003). See also *Commonwealth v. Flynn*, 420 Mass. 810, 818 (1995) (new trial required where manslaughter verdict legally unsupportable on one theory and unknown which theory jury adopted).

The jury was instructed on both theories of arson. T8:96-99. Therefore, if this Court finds that there is support for one theory, but not the other, a new trial is required. However, because there was no support for either theory, all of Ms. Pfeiffer's convictions must be vacated.

**II. THE ARSON CONVICTION MUST BE REVERSED BECAUSE 1) THE FAILURE TO REPORT A NEGLIGENTLY SET FIRE DOES NOT VIOLATE THE ARSON STATUTE; 2) EVEN IF IT DOES, THE COMMONWEALTH WAIVED THAT THEORY OF OFFENSE; AND 3) THE JUDGE ERRED IN REFUSING TO GIVE A SPECIFIC UNANIMITY INSTRUCTION.**

Even if this Court finds sufficient evidence of arson, the conviction cannot stand. To start, the failure to report a negligently set fire does not

violate the arson statute. And, even if it does, the Commonwealth explicitly waived that theory of arson when it told the court it was pursuing only the theory that Ms. Pfeiffer intentionally set fire to the dwelling. Finally, where the jurors were permitted to convict on either one of the two theories, each of which relied upon different findings of fact, a specific unanimity instruction was required. All of Ms. Pfeiffer's convictions must be reversed.

**A. The Failure to Extinguish or Report a Fire Is Not Arson.**

The willful and malicious failure to extinguish or report a negligently set fire is not now, nor ever has been, the crime of arson. It is not arson pursuant to statute. See G. L. c. 266, § 1. It was not arson at common law. See *Commonwealth v. Lamothe*, 343 Mass. 417, 419 (1961) (common law arson was willful and malicious burning of another's house). The trial court erred in instructing the jury that it could convict on this basis.

*1. The Failure to Extinguish or Report a Negligently Set Fire Is Not a Crime under the Arson Statute.*

To determine whether conduct falls within the scope of a statute, this Court starts with the language of the statute itself, heeding Justice Frankfurter's timeless advice on statutory interpretation: "(1) Read the statute; (2) read the

statute; (3) read the statute!" *In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004), *quoting* Henry J. Friendly, *Benchmarks* 202 (1967). "The statutory language, when clear and unambiguous, must be given its ordinary meaning," and this Court presumes "that the legislature intended what the words of the statute say." *Commonwealth v. Williamson*, 462 Mass. 676, 679 (2012) (internal quotations omitted); *Wheatley v. Mass. Insurers Insolvency Fund*, 456 Mass. 594, 601 (2010) (words of statute conclusive as to legislative intent).

General Law c. 266, § 1, criminalizing arson of a dwelling, provides: "Whoever wilfully and maliciously sets fire to, burns, or causes to be burned ... a dwelling house ... shall be punished." In this instance, the language is clear: those who intentionally and maliciously cause a dwelling to burn shall be punished. Those who accidentally cause a dwelling to be burned shall not. Noticeably absent from this statute is the criminalization of the intentional failure to extinguish or report a negligently set fire.

*2. The Failure to Extinguish or Report a  
Negligently Set Fire Was Not Arson at  
Common Law.*

Although this Court need not look any further than the language of the statute, the history of G. L. c. 266, § 1 compels the same conclusion. *See ENGIE Gas*

& *LNG LLC v. Dept. of Public Utilities*, 475 Mass 191, 198-199 (2016) (considering history of statute).

Arson was originally a common law crime. See *Commonwealth v. Lamothe*, 343 Mass. at 419 (arson statute drawn against common law background). At common law, arson was defined as "maliciously and voluntarily burning the House of another by Night or by Day." 1 Hawk. c. 39,<sup>7</sup> *infra* at 59. As to malice, the rule was:

With what degrees of Malice such House ought to be burnt; it seems clear, That if the Fire happened through Negligence or Mischance, it cannot make him, who is the unfortunate Cause of it, guilty of Arson; for the Indictment must alledge [sic] the Offence to have been done *Voluntariè ex Malitiâ suâ præcogitatâ & felonice*.<sup>8</sup>

1 Hawk. c. 39, § 5, *infra* at 60.

Thus, under the common law, the failure to report a negligently set fire would not have been arson. Not only is there nothing in the common law definition that criminalized such conduct, the common law

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<sup>7</sup> This citation format is from *Commonwealth v. Pemberton*, 118 Mass. 36, 43 (1875), and refers to William Hawkins, *A Treatise of the Pleas of the Crown: or A System of Principal Matters Relating to that Subject Digest under Their Proper Heads* (4<sup>th</sup> ed. 1762). Cited pages are reproduced in the addendum.

<sup>8</sup> "Voluntariè" means voluntarily. 29 Am. Inst. Crim. L. & Criminology 639 (1938-1939). "Ex Malitiâ suâ præcogitatâ" means with malice aforethought. BALLENTINE'S LAW DICTIONARY 437 (3<sup>rd</sup> ed. 1969). "Felonice" means feloniously. *Id.* at 464.

explicitly required malice aforethought. *Id.* Under the failure to report theory, malice is an afterthought.<sup>9</sup>

The codification of arson did not alter the malice aforethought requirement. When the Legislature amended G. L. c. 266, § 1 in 1932, it made changes by simplifying the definition of certain offenses, creating new offenses, eliminating some of the common law's technical attributes, and extending criminal liability to homeowners. See *Commonwealth v. Bloomberg*, 302 Mass. 349, 352 (1939).

Notwithstanding these differences, "the Legislature engrafted in [c. 266,] § 1 the common law understanding of arson." *Commonwealth v. DeCicco*, 44 Mass. App. Ct. 111, 127 (1998). Most significantly, the words "willfully and maliciously" were incorporated as an integral part of arson offenses; indeed, "[t]hey constitute the substance of the crime." See *Commonwealth v. Cooper*, 264 Mass. 378, 380 (1928); G. L. c. 266, §§1, 2, 5, 5A. Since the common law only covered willful and malicious burnings, and the legislature incorporated this requirement into the statute, there is no historical support for an arson conviction for a negligently set fire.

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<sup>9</sup> As stated in the model instructions, "[t]he necessary criminal state of mind for arson may be formed after a fire starts." Massachusetts Superior Court Criminal Practice Jury Instructions § 4.3.3(a) (MCLE 2<sup>nd</sup> ed. 2013).

3. *The Supplemental Model Instruction for Arson, Which Allows a Conviction Based upon Intent that Forms after the Conduct Is Complete, Inaccurately States the Law.*

The jurors were given the following model instruction:

[A] person may have the required intent for arson if he or she negligently or accidentally causes a fire and then willfully and maliciously makes no attempt to extinguish or to report it. The necessary criminal state of mind for arson may be formed after a fire starts.

Massachusetts Superior Court Criminal Practice Jury Instructions § 4.3.3(a); T7:204-205; T8:24, 124. This is an inaccurate statement of law.

As explained above, the arson statute mandates malice aforethought, as did common law arson. Moreover, current jurisprudence on the timing of intent requires the *mens rea* to precede or coincide with the *actus reus*. See *Commonwealth v. Lopez*, 433 Mass. 722, 725 (2001). The beginning and end of a crime "are marked by what is done, rather than what is thought." *Commonwealth v. Dellelo*, 349 Mass. 525, 529 (1965). Once an act is complete, the fact that an actor's thoughts change cannot transform the act into a crime. See LaFave, *SUBSTANTIVE CRIMINAL LAW* § 6.3(a) (2<sup>nd</sup> ed. 2003) (basic premise of criminal law that physical conduct and state of mind must concur); *Commonwealth v. Christian*, 430 Mass. 552, 559 (2000) (if intent to steal comes after death, no causal relationship



between robbery and death); *Commonwealth v. Moran*, 387 Mass. 644, 646 (1982) (no robbery if intent to steal is afterthought to prior assault). Accordingly, this jury instruction, which allows for the criminal intent to form after the conduct, is wrong.

It appears that this instruction is based on the opinion in *Commonwealth v. Glenn*, 23 Mass. App. Ct. 440 (1987), where the Appeals Court held that it is proper to instruct the jury that the intentional failure to extinguish or report a fire is arson. *Id.* at 444; Massachusetts Superior Court Criminal Practice Jury Instructions § 4.3.3(a). The *Glenn* decision relied on *Commonwealth v. Cali*, 247 Mass. at 25, but that case is distinguishable.

In *Cali*, the defendant was not charged with arson, but with burning a dwelling with the intent to injure an insurer under G. L. c. 266, § 10 – an offense only “somewhat similar to arson.” *Commonwealth v. Glenn*, 23 Mass. App. Ct. at 443. The *Cali* court stated that under G. L. c. 266, § 10 the intent to injure the insurance company could be formed after the fire began. *Id.* at 25. In actual arson cases under G. L. c. 266, § 1, however, the failure to extinguish or report a fire is usually presented as proof of consciousness of guilt, not the basis for the arson conviction. See, e.g., *Commonwealth v. Dung Van Tran*, 463 Mass. at 27-28 (jury may infer failure to put out

the fire or sound alarm indicated defendant intended to burn apartment); *Commonwealth v. MacKenzie*, 376 Mass. 148, 150 (1978) (abandoning car making no effort to extinguish or report fire indicative of guilt); *Commonwealth v. Cavedon*, 301 Mass. 307, 314-315 (1938) (failure to give alarm indicative of guilt). The *Glenn* case's use of such conduct as a separate basis for an arson conviction was wrong, and an aberration under the statute and the common law.

Because the failure to extinguish or report a negligently set fire is not arson, but the jurors were instructed otherwise, Ms. Pfeiffer's convictions must be reversed.

**B. The Jury Should Not Have Been Instructed on the Failure to Report Theory of Arson Because the Commonwealth Explicitly Waived This Theory.**

Should this Court find the failure to report to be a valid theory of arson, it was still error to put it before the jury because the Commonwealth explicitly disclaimed it as a theory of the case.

*1. The Commonwealth Unambiguously Stated It Would Be Proceeding Only on the First Theory of Arson.*

Prior to trial, defense counsel filed a motion for a bill of particulars, in part to determine the Commonwealth's theory of arson. R:53. At the October 13, 2015, hearing on the motion, the Commonwealth

stated that its theory was that Ms. Pfeiffer set the fire intentionally:

ADA: Your Honor, it is our theory that the defendant intentionally set her boyfriend's items on fire inside their apartment, and that once the fire started to overwhelm the inside of their apartment, she fled and just waited outside..

So it is our position that this defendant intentionally started this fire by setting her boyfriend's possessions on fire inside their apartment building causing --

COURT: That proves the crime of arson.

...

COURT: So you plan to try this as a felony murder?

ADA: Correct.

COURT: And that's the only theory that you are proceeding under?

ADA: That she intentionally set this fire, and by intentionally starting this fire, it resulted in the death of Ms. Blanchard.

...

COURT: Why can't I endorse the motion that there is no action necessary based on the Commonwealth's representation that it will proceed on second degree murder on a theory of felony murder, the underlying felony being the intentional setting of a fire to an occupied dwelling?

DEFENSE: As long as the language makes it clear that it's the setting of the fire, not the failing to act after a fire --

COURT: That's what I've just heard. Ms. Higgins?

ADA: Correct, she intentionally set the fire. That's our position.

R:115-117. In its endorsement on the motion, the judge ruled that a bill of particulars was not required because the Commonwealth represented that the crime of arson was committed "by intentionally setting fire to or within an occupied dwelling." R:53.

This continued to be the Commonwealth's position in its proposed statement of the case in a pleading filed on January 14, 2016 (R:56), and in its requests for pre-charge jury instructions filed on February 1, 2016 (R:126-127). The Commonwealth did not even request the supplemental instruction on failure to report in its requested jury instructions. R:159-161. It was not until after the judge brought it up, *sua sponte*, at the final charge conference on February 9, 2016, that the Commonwealth requested the instruction on the failure to report theory. T7:204, 208-210.

Defense counsel repeatedly objected to this instruction. Counsel objected at the charge conference, T7:204-205, and reiterated his objection both before and after the instruction was given. T8:24, 124.

*2. Ms. Pfeiffer Was Prejudiced by this Last Minute Shift in the Commonwealth's Position.*

This last minute shift in the Commonwealth's position was a violation of due process and prejudiced the defense. Due process requires the Commonwealth to provide reasonable knowledge of the nature and

character of the crime charged. See *Commonwealth v. Pillai*, 445 Mass. 175, 188 (2005); Massachusetts Declaration of Rights, art. 12.<sup>10</sup> Defense counsel, in order to obtain that knowledge, filed a motion for a bill of particulars. R:53.

The purpose of a bill of particulars is to "bind and restrict the Commonwealth as to the scope of the indictment and to the proof to be offered in support of it." *Rogan v. Commonwealth*, 415 Mass. 376, 378 (1993) (internal quotations and citations omitted). The Commonwealth stated, almost five years after the fire and with all facts at its disposal, that it was proceeding on the theory that the fire was intentionally set. Contrast *Commonwealth v. Garner*, 59 Mass. App. Ct. 350, 362 (2003) (shifting theory not deliberate where case in early stages remained open and in evidentiary development). It so stated even after defense counsel explicitly asked if the Commonwealth would rely on another theory of arson. R:117. It was bound by this declaration.

Ms. Pfeiffer was both surprised and prejudiced by the Commonwealth's last minute change of heart regarding its theory of the case. Contrast *id.* at 361-363 (Commonwealth did not lock itself into one theory

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<sup>10</sup> Article 12 states: "No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him..."

of murder and no unfair prejudice to defense theory). It is unlikely that the jury convicted Ms. Pfeiffer of intentionally burning down the building - the evidence strongly demonstrated that she set fire to a pile of clothes, as she had before to no ill effect, and as a borderline developmentally disabled woman who suffered PTSD from years of trauma, she had no ability to foresee the consequences. T7:155-156, 160. More likely, the jury convicted Ms. Pfeiffer of failing to extinguish or report the fire.

Had defense counsel known he would have to defend against the second theory of arson, he could have presented evidence to this end. For example, the evidence about when the bystanders called 911 and when Ms. Pfeiffer found out about it was murky. T4:89; T7:206-207; R:108. With notice, defense counsel could have clarified this testimony. Similarly, had defense counsel known that the jury would be permitted to consider this theory, he could have argued that Ms. Pfeiffer reported the fire to Mr. Brewer (R:80) and presented evidence from the suppressed portion of Ms. Pfeiffer's statement to the police that she tried to extinguish the fire with a pan but it still got too out of control. See Ex. 1B (from hearing on Motion to Suppress) at approximately 1:51. Because Ms. Pfeiffer was denied her due process right to notice of the nature of the crime charged, a new trial is required.

**C. The Judge's Refusal to Instruct the Jury that the Verdict Had to Be Unanimous as to the Theory of Arson Was Prejudicial Error.**

Once it became clear that the Commonwealth would be permitted to proceed on both theories of arson, defense counsel requested a specific unanimity instruction. T7:213; T8:26. The court refused. T7:213; T8:26-27. This was error.

The jury verdict in criminal trials must be unanimous. *See Commonwealth v. Berry*, 420 Mass. 95, 111 (1995). Specific unanimity instructions inform the jurors that they must all agree on the specific act that constitutes the offense. *See Commonwealth v. Conefrey*, 420 Mass. 508, 512 (1995). "Absent a specific unanimity instruction, the jury might mistakenly believe that they could convict the defendant even if they disagreed as to which of the alleged criminal acts he had committed." *Commonwealth v. Santos*, 440 Mass. 281, 285 (2003). *See Commonwealth v. Accetta*, 422 Mass. 642, 646-647 (1996) (requiring specific unanimity instruction on different theories).

In this case, the jury could have convicted Ms. Pfeiffer either for the act of intentionally starting the fire, or for the act of failing to extinguish or report a negligently started fire, but not both. These acts are mutually exclusive - she could not have both negligently and intentionally started the fire. Where there are "separate, distinct, and essentially

unrelated ways in which the same crime can be committed," a specific unanimity instruction is required. *Commonwealth v. Santos*, 440 Mass. at 288 (noting voluntary and involuntary manslaughter, which require specific unanimity instruction, are mutually exclusive).

The judge's refusal to give the requested specific unanimity instruction allowed the jury to return a non-unanimous verdict, "which in essence is no verdict at all." *Commonwealth v. Zane Z.*, 51 Mass. App. Ct. 135, 140-141 (2001). Reversal is required.

**III. THE SECOND DEGREE FELONY-MURDER CONVICTION MUST BE OVERTURNED ON VARIOUS CONSTITUTIONAL GROUNDS AND MS. PFEIFFER MAY NOT BE RETRIED FOR SECOND DEGREE MURDER ON THE THEORY OF THIRD PRONG MALICE DUE TO LACK OF EVIDENTIARY SUPPORT.**

Ms. Pfeiffer's murder conviction must be vacated for many reasons. First, the application of the second degree felony-murder rule in these circumstances was unconstitutional<sup>11</sup> because the judge, rather than the jury, determined that the crime was committed with a conscious disregard for the risk to human life - a critical element that increases the maximum possible

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<sup>11</sup> Recognizing that this Court has repeatedly rejected the argument that the felony-murder rule is unconstitutional as a matter of due process, see *Commonwealth v. Brown*, 477 Mass. 805, 823 (2017), *Commonwealth v. Pope*, 406 Mass. 581, 591 (1990) (collecting cases), this brief raises constitutional issues specific to second degree felony-murder. See also *Commonwealth v. Eagles*, 419 Mass. 825, 839 (1995) (declining to abolish felony-murder doctrine).



penalty in the case of arson from twenty years to life. Moreover, without a jury finding on the conscious disregard element, the conviction also violates constitutional proportionality requirements because the intent transferred from the arson conviction supports only a maximum sentence of twenty years, not a life sentence.

Even if this Court disagrees that this conviction violated constitutional principles, it still must be overturned because Ms. Pfeiffer was entitled to have the jury consider her defense that she did not consciously disregard a known risk. Furthermore, in the circumstances presented, the arson merged with the felony-murder. Finally, there was insufficient evidence for Ms. Pfeiffer's second degree murder conviction under the third prong malice theory.

**A. The Judicial Determination of Inherent Dangerousness Deprived Ms. Pfeiffer of Her Jury Trial and Due Process Rights.**

Felony-murder has three elements: 1) the commission or attempted commission of a non-life felony; 2) a death occurred during the commission of the underlying felony; and 3) the underlying felony was inherently dangerous or the defendant acted with a conscious disregard for the risk to human life. See *Commonwealth v. Fantauzzi*, 91 Mass. App. Ct. 194, 204 n.10 (2017).

Whether a particular felony is inherently dangerous (and therefore implicitly committed with a conscious disregard for the risk to human life, see *Commonwealth v. Scott*, 428 Mass. 362, 364 (1998)) is a largely fact-dependent inquiry resting "upon a case-by-case analysis of the nucleus of facts in which that felony is embedded." *Commonwealth v. Garner*, 59 Mass. App. Ct. at 357. Indeed, a felony may be inherently dangerous or reflect a conscious disregard in one factual context, but not in a different factual context. *Id.* And yet, even though this determination is both contextual and heavily fact-dependent, under current law the judge decides whether a felony is inherently dangerous and, if it is, takes the third element away from the jury. See *Commonwealth v. Wadlington*, 467 Mass. 192, 208 (2014) (proper for judge to instruct that felony inherently dangerous). Current law is wrong; this is unconstitutional.

It is axiomatic that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000); U.S. Const. amend. VI, XIV. A defendant may not be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone. See

*Ring v. Arizona*, 536 U.S. 584, 602 (2002). Yet that is exactly what happened here.

In this case, and over objection, the judge withdrew the third element from the jurors' consideration, instructing them as a matter of law that arson is inherently dangerous. T7:224-225; T8:24, 108, 124. Thus, the only elements that the jurors found beyond a reasonable doubt were 1) Ms. Pfeiffer committed arson; and 2) a death occurred during the commission of the arson. The maximum penalty that could have been imposed upon Ms. Pfeiffer based on the facts reflected in the jury's verdict alone was twenty years. See G. L. c. 266, § 1. What permitted the life sentence Ms. Pfeiffer ultimately received was the finding of fact made by the judge - that arson is inherently dangerous. See *Commonwealth v. Matchett*, 386 Mass. 492, 506-507 (1982) (felony-murder rule only applies to inherently dangerous felonies). This violated the jury trial guarantees of the Sixth Amendment and article 12. See *Apprendi v. New Jersey*, 530 U.S. at 476, citing *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999); *Commonwealth v. Beale*, 434 Mass. 1024 (2002) (applying *Apprendi* to larceny statute).

Not only does a judicial determination of inherent dangerousness deprive defendants of their right to a jury trial, it also deprives them of their

due process rights. If this issue had been presented to the jury, its determination would have been based upon proof beyond a reasonable doubt. The judge's findings, on the other hand, are not required to be based upon proof beyond a reasonable doubt. *Cf. Commonwealth v. Oppenheim*, 86 Mass. App. Ct. 359, 366 (2014) (preliminary facts determined by a preponderance of the evidence). Convictions based upon proof less than beyond a reasonable doubt are unconstitutional. *See Carella v. California*, 491 U.S. 263, 265 (1989) (jury instruction relieving prosecution of burden of proof beyond a reasonable doubt denial of due process); U.S. Const. amend. XIV; Massachusetts Declaration of Rights, arts. 1, 10, 12.

The usurpation of the jury's role in Ms. Pfeiffer's trial violated her federal and state constitutional rights and necessitates a new trial.

**B. The Mandatory Life Sentence for Second Degree Felony-Murder is Unconstitutionally Disproportionate to the Intent Transferred from the Underlying Non-Life Felony.**

Intent is a question of fact that must be found by a jury. *See Morissette v. United States*, 342 U.S. 246, 274 (1952) (intent is question of fact that must be submitted to jury); *Commonwealth v. Nolin*, 448 Mass. 207, 217 (2007) (cannot have mandatory presumption of intent). Although the intent for homicide is judicially defined as malice aforethought,

see *Commonwealth v. Boyajian*, 344 Mass. 44, 48 (1962), at the time of trial, felony-murder was an “unusual” species of homicide that did not require proof of malice. See *Commonwealth v. Tejada*, 473 Mass. 269, 277 (2015). Instead, malice was conclusively presumed from the intent to commit the underlying felony. *Id.* at 276.

However, malice was not conclusively presumed from the intent to commit all felonies – just those felonies that are inherently dangerous. See *Commonwealth v. Matchett*, 386 Mass. at 506-507. If a felony was not inherently dangerous, in order to demonstrate the requisite malice, the Commonwealth had to prove, beyond a reasonable doubt, that the defendant committed the felony with a conscious disregard for the risk to human life. See *id.* at 507. See also *Commonwealth v. Scott*, 428 Mass. at 364 (since unarmed robbery not inherently dangerous jury must find crime committed with conscious disregard for human life). In other words, in some cases, the Commonwealth had to prove malice – in the form of a conscious disregard for the risk to human life – independently of the transferred intent because the transferred intent was insufficient to support a felony-murder conviction.

The problem with insisting that the Commonwealth prove malice independently in just **some** cases is that

the transferred intent is insufficient to support a conviction for second degree felony-murder in **all** cases. It is insufficient because the transferred intent is disproportionate to the intent necessary to sustain a conviction that accompanies a life sentence. The history of felony-murder makes this plain.

At early common law, the intent transferred from the felony through the felony-murder rule was an intent that warranted the same punishment as felony-murder itself - homicide was a capital offense, as were most felonies. See *Commonwealth v. Matchett*, 386 Mass. at 503 n.12; Hawkins Treatise: An Analysis of the First Book of the Pleas of the Crown (felonies are capital offenses), *infra* at 57-58.<sup>12</sup> As such, whether a person was convicted of a felony or convicted of felony-murder for the death that resulted from the felony was of no import - either way, the sentence was the same. See *Commonwealth v. Matchett*, 386 Mass. at 503 n.12.

For first degree felony-murder convictions, this remains true, at least to a degree. Only felonies that carry the potential for a life sentence may be the basis for a first degree felony-murder conviction, which requires a life sentence. See *Commonwealth v. Garcia*, 470 Mass. 24, 38 (2014) (first degree felony-

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<sup>12</sup> This section of the Treatise comes prior to the chapter portion of the book; the book is not paginated.

murder predicated on life felony). Consequently, the intent for the underlying felony is an intent that may warrant the imposition of a life sentence.

But in second degree felony-murder cases, which also result in a life sentence, the underlying felony does not, and cannot, result in a life sentence. *Id.* (second degree felony-murder predicated on non-life felony). This means that the intent for the felony underlying a second degree felony-murder conviction is not one that warrants a life sentence. This is important.

Both the Eighth Amendment and article 26 require proportionality in sentencing. *See Solem v. Helm*, 463 U.S. 277, 290 (1983); *Cepulonis v. Commonwealth*, 384 Mass. 495, 496 n.2 (1981) (proportionality test applicable under art. 26); U.S. Const. amend. VIII; Massachusetts Declaration of Rights, art. 26. Indeed, sentences that are disproportionate to the crime committed have been prohibited since the Magna Carta. *See Solem v. Helm*, 463 U.S. at 284. It is also "fundamental" that a defendant's intention is critical to the degree of culpability. *See Edmund v. Florida*, 458 U.S. 782, 798 (1982); *Commonwealth v. Sneed*, 413 Mass. 387, 393 (1992) (appropriate to make criminal liability and punishment proportionate to actor's moral culpability).

In *Commonwealth v. Vizcarrondo*, 427 Mass. 392 (1998), this Court held that a murder conviction founded upon a state of mind sufficient only to support a manslaughter conviction was inconsistent with the principle of proportionality. *Id.* at 397. Analogously, a murder conviction (and its accompanying life sentence) founded upon a state of mind sufficient only to support a non-life felony conviction is inconsistent with the principle of proportionality. To make a second degree felony-murder conviction consistent with proportionality, the jury must find that the defendant acted with a conscious disregard for the risk to human life.

Not only must the jury must find that the defendant acted with a conscious disregard for the risk to human life to comport with proportionality principles, such a finding is also required because instructing the jury that a felony is inherently dangerous creates a mandatory presumption of intent that violates due process. See *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (conclusive presumptions conflict with presumption of innocence); *Commonwealth v. Zezima*, 387 Mass. 748, 755 (1982) (jury instructions creating mandatory presumption violate due process); U.S. Const. amend. XIV; Massachusetts Declaration of Rights, arts. 1, 10, and 12. *But see Commonwealth v. Moran*, 387 Mass. at 650 (no presumption of malice



aforethought). Specifically, since the transferred intent in non-life felonies is insufficient to support a murder conviction, if the jury does not find a conscious disregard for the risk to human life, the intent comes from the judge's determination that a felony is inherently dangerous. Because the jury was instructed that they must accept the judge's determination that the felony was inherently dangerous, the trial court imposed an unconstitutional mandatory presumption. T8:108.

"[T]he law, if it is to maintain the community's respect, must grade its condemnation according to the moral turpitude of the offender as the community evaluates it." *Commonwealth v. Gould*, 380 Mass. 672, 686 (1980) (quotations and citations omitted). In second degree felony-murder cases, the jury must find a conscious disregard for the risk to human life to conform with proportionality principles. Because the jury did not decide this issue, Ms. Pfeiffer's murder conviction must be reversed.

**C. The Court's Instruction that Arson Is Inherently Dangerous Denied Ms. Pfeiffer Her Only Defense to the Felony-Murder Charge.**

Even if it was not unconstitutional to instruct the jury that arson is an inherently dangerous felony, it was error, under the circumstances presented in this case, to instruct the jury that the underlying felony was inherently dangerous. It was erroneous

because even if Ms. Pfeiffer was rightfully convicted of arson, which she was not, she did not consciously disregard the risk to human life in committing the offense. Since this jury instruction deprived Ms. Pfeiffer of her only defense to the felony-murder charge, she deserves a new trial with proper jury instructions.

This Court has held that judges need not instruct on conscious disregard in arson cases because arson is an inherently dangerous felony. See *Commonwealth v. Mello*, 420 Mass. 374, 391 (1995). While that may be true as a general proposition, it was not true here. Ms. Pfeiffer's mental impairments were relevant to whether she, personally, consciously disregarded a known risk even if, in these circumstances, one could presume a conscious disregard by a regular person.

A defendant's mental impairment is relevant to intent and knowledge. See *Commonwealth v. Gaboriault*, 439 Mass. 84, 92 n.12 (2003), citing *Commonwealth v. Sires*, 413 Mass. 292, 299 (1992). In *Commonwealth v. Lawson*, 475 Mass. 806 (2016), this Court held that an inference that a person is criminally responsible diminishes the standard of proof, especially where there is significant evidence of a defendant's mental health history and bizarre behavior. *Id.* at 815. See also *Commonwealth v. Grey*, 399 Mass. 469, 470-471 (1987) (exclusion of evidence bearing on defendant's

capacity to form specific intent raises constitutional problems).

Similarly, it diminished the standard of proof in this case to permit an inference that Ms. Pfeiffer acted with a conscious disregard for the risk to human life. Ms. Pfeiffer has only borderline intellectual functioning and suffers from PTSD as a result of the horrible trauma she has endured throughout her life. T7:154. Her cognitive impairment and mental disorder combine to deprive her of the facilities needed to make links between cause and effect and to understand what risks or consequences flow from her acts. T7:155-156. Dr. DiCataldo testified that when Ms. Pfeiffer ignited the clothing, she did not fully appreciate what could reasonably follow. T7:160.<sup>13</sup> If she did not or could not know the risks of her actions, she could not disregard them.

Thus, this jury instruction deprived Ms. Pfeiffer of her defense. This Court has long held under comparable circumstances that taking intent away from the jury improperly deprives a defendant of her defense. *See generally Commonwealth v. Gould*, 380 Mass. at 686 & n.16. In *Commonwealth v. Rutkowski*, 459 Mass. 794 (2011), this Court ruled that the jury should have been allowed to consider evidence of

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<sup>13</sup> It appears that the jury credited the doctor's testimony as it did not convict Ms. Pfeiffer of second degree murder on the theory of third-prong malice.

mental impairment on the question of extreme atrocity and cruelty. *Id.* at 799. Specifically, this Court stated that "where evidence of the defendant's mental impairment is significant and where it is a critical aspect of her defense, the failure to instruct the jury that they could consider evidence of that impairment on the question of extreme atrocity and cruelty effectively removed what may have been her only viable defense." *Id.*

The same analysis applies to this case. Assuming Ms. Pfeiffer was guilty of arson, her only defense to the felony-murder conviction was that she did not consciously disregard the risk of death. She presented significant evidence on this issue and it was critical to her defense. In this context - and whether a felony is inherently dangerous is a factual determination based on context, *see Commonwealth v. Garner, supra* - the jury should have been instructed that they had to find that Ms. Pfeiffer committed the arson with a conscious disregard for the risk to human life. *Compare Commonwealth v. Fantauzzi*, 91 Mass. App. Ct. at 204-205 (allowing self-defense instruction in felony-murder case for first time based on unique circumstances presented). As the jury was not so instructed, a new trial is required.

**D. The Acts That Were the Basis for the Arson Conviction Were Not Independent of the Acts Causing the Homicide.**

In felony-murder cases, the conduct that constitutes the felony "must be separate from the acts of personal violence which constitute a necessary part of the homicide." See *Commonwealth v. Quigley*, 391 Mass. 461, 466 (1984) (internal quotations and citations omitted). Whether a felony is sufficiently independent of the killing is determined on a "case-by-case basis and with reference to specific facts." *Commonwealth v. Gunter*, 427 Mass. at 275 n.15. This Court should vacate the felony-murder conviction because the acts constituting the arson were not independent of the acts causing the homicide.

Generally speaking, a felony is independent if, given the facts of the case, the felony could have been completed without the killing, but then some additional action was undertaken during the commission of the felony that caused the death. See *Commonwealth v. Bell*, 460 Mass. 294, 300 (2011) (setting fire was force for armed home invasion and cause of death so home invasion could not be basis of felony-murder); *Commonwealth v. Kilburn*, 438 Mass. 356, 359 (2003) (if defendant committed two assaults, one threat with gun and one shooting with gun, where victim died of gunshot wound, second assault merged with felony-murder but first assault did not). But see

*Commonwealth v. Tevlin*, 433 Mass. 305, 314-315 (2001) (for armed robbery, intent to steal is substitute for malice; fact that force for armed robbery is force that killed is not relevant to the merger analysis).

In this case, the facts demonstrate that Ms. Pfeiffer committed only one act. It is unknown from the jury's verdict what that act was found to be - either Ms. Pfeiffer intentionally set fire to the dwelling or she failed to extinguish or report the fire. But either way, once Ms. Pfeiffer intentionally set the fire or failed to extinguish or report the fire, she took no additional action that caused the victim's death. She did not use an accelerant, she did not block a door, she did not do anything else to cause the fire to kill.

Tragically, once this fire was started, its path was set. Because Ms. Pfeiffer did not undertake any additional action beyond that required for an arson conviction, the arson merged with the felony-murder. The felony-murder conviction must be vacated.

**E. Ms. Pfeiffer Cannot Be Retried on Second Degree Murder on the Theory of Third Prong Malice Because That Theory Lacked Evidentiary Support.**

If this Court vacates the felony-murder conviction, Ms. Pfeiffer cannot be retried on the third prong malice theory of second degree murder

because the evidence presented was insufficient to support third-prong malice.<sup>14</sup>

There was no evidence that Ms. Pfeiffer intended to kill or harm the victim, so the jurors were only instructed on third prong malice. T7:102-105. In order to establish third prong malice, the Commonwealth had the burden of proving that Ms. Pfeiffer knew that she was setting fire to an occupied apartment building and that a reasonably prudent person would recognize that such conduct created a plain and strong likelihood of death. *See Commonwealth v. Mello*, 420 Mass. 375, 390 (1995). The Commonwealth did not meet its burden.

Ms. Pfeiffer did not knowingly set fire to the building, and there was no evidence she knew it was occupied. T5:35; R:95. Moreover, this Court has held that setting fire to one curtain in an apartment, without using an accelerant and without blocking egress from the apartment was not likely to result in death. *See Commonwealth v. Thomas*, 469 Mass. 531, 552c (2014). Similarly, where Ms. Pfeiffer set fire to clothes in an apartment without the use of an

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<sup>14</sup> Defense counsel moved for a required finding of not guilty on this charge. R:184-185. While the jurors were instructed they could find Ms. Pfeiffer guilty under both theories of second degree murder, T8:101, and that they could check off both on the verdict slips if they found her guilty of both, T8:114-115, because the jurors only checked off felony-murder, R:186, this Court does not consider the lack of a check mark an acquittal. *See Commonwealth v. Carlino*, 449 Mass. 71, 80 (2007).

accelerant and did not block egress from the apartment building, there was not a plain and strong likelihood of death in this case either. Indeed, comparable fact patterns have resulted in involuntary manslaughter convictions rather than murder convictions. See *Commonwealth v. Levesque*, 436 Mass. at 444 (charging involuntary manslaughter for negligently starting fire and failing to report it which allowed fire to expand and caused death of six firefighters); *Commonwealth v. Black*, 4 Mass. App. Ct. 512, 514, 518 (1976) (setting couch on fire without intent to burn building in disregard to probable harmful consequences to children upstairs was wanton and reckless, supporting conviction for involuntary manslaughter).

In sum, the evidence was insufficient to support a conviction on the theory of third prong malice and Ms. Pfeiffer cannot be retried on this ground.

**IV. THE COMMONWEALTH HAS A DUTY TO INSTRUCT THE GRAND JURORS ON THE ELEMENTS OF THE OFFENSE IF THE DEFENDANT SO REQUESTS.**

In appropriate instances, the Commonwealth is obligated to advise the grand jury concerning the law. See *Attorney General v. Pelletier*, 240 Mass. 264, 307 (1922). Currently, there are only two appropriate instances: 1) when the grand jury requests that information, see *Commonwealth v. Noble*, 429 Mass. 44, 48 (1999); and 2) in juvenile murder cases with significant mitigating circumstances, where



prosecutors must provide both the elements of the crime, as well as mitigating circumstances and defenses. See *Commonwealth v. Walczak*, 463 Mass. 808, 810 (2012). This case presents a third appropriate instance: in homicide cases, and in other cases where the elements of the offense are unclear, legal instructions must be given upon the defendant's request.

The justifications for such a rule are twofold. First, murder defendants are qualitatively different from other defendants due to the mandatory life sentence that accompanies a conviction. Second, the evidence a lay grand juror might believe proves a crime and the evidence that actually proves that crime do not always correlate. Both of these justifications are present here.

Prior to indictment, defense counsel asked the Commonwealth to instruct the grand jurors on the elements of felony-murder and arson. MTD:8; R:31, 50. The Commonwealth refused. MTD:17; R:31. This refusal prejudiced Ms. Pfeiffer because, had the grand jury been properly instructed, they might have returned an involuntary manslaughter indictment rather than a murder indictment.

This is a critical distinction because murder defendants and manslaughter defendants are qualitatively different. Murder defendants are facing

a mandatory life sentence and this significantly and detrimentally impacts their pre-trial negotiating position as compared to manslaughter defendants. This Court in *Walczak* suggested that such differences are relevant. *Id.* at 824-825 (instructions serve significant purpose because grand jury is gatekeeper to different sentencing options in juvenile and adult court systems).

Justice Lenk's opinion stated that legal instructions are required where there is significant evidence of mitigating circumstances because 1) the adult and juvenile court systems are qualitatively different, such that the return of a murder indictment deprives the juvenile of juvenile court protections; and 2) the grand jury is the sole gatekeeper between these two systems. *Id.* at 823-824 (Lenk, J. concurring). Then Justice Gants, in his concurring opinion, would have extended this obligation to adult cases, citing the complexity of homicide law and the fact that murder indictments do not list the elements of the crime, meaning that a grand juror would be unaware of the legal significance of mitigating defenses. *Id.* at 839-840 (Gants, J., concurring).

Likewise, the grand jury is the gatekeeper of the defendant's likely sentence in adult murder cases. Although the appropriate charge could theoretically be sorted out by a petit jury, now that our courts are a

system of pleas, "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Id.* at 833 n.31, quoting *Missouri v. Frye*, 566 U.S. 133, 143-144 (2012). A murder defendant, therefore, is at a distinct disadvantage in the pre-trial negotiating process, a disadvantage that might not be warranted had the jury been properly instructed on the elements.

Ms. Pfeiffer was unfairly disadvantaged. The grand jurors were not instructed on malice and would not have even known they had to find malice. They were not instructed on the elements of felony-murder, either, and they were not instructed on the elements of arson. Without instructions, the grand jury was indicting blind.

While grand jurors do not always need instructions to have sufficient understanding of the offense to indict, instructions are necessary where the elements are not set forth in the indictment or they are unclear. The law of homicide presents both problems - the indictment does not list the elements and it is a complex area of law. The indictment for arson is similarly complicated.

Ms. Pfeiffer's arson indictment made the following accusation: that she "wilfully and maliciously did set fire to, burn, or cause to be burned, a dwelling house..." R:26. It is clear from

this language that, in order to indict, the grand jury had to find that Ms. Pfeiffer purposely started a fire and burned a dwelling. What is not in any way obvious is that for this to be arson, she had to burn the building on purpose, not just start the fire on purpose.

It is possible that in many, if not most, cases no instructions will be necessary. But this was not one of those cases. Defense counsel knew the facts, knew the law, and concluded that a properly instructed grand jury was essential. Because the law of homicide is complex, and the elements of both murder and arson are not obvious from the face of the indictment, upon defense counsel's request, the grand jury should have been instructed on the elements of those two offenses. Since they were not, the indictments must be dismissed.

#### **CONCLUSION**

For the reasons stated above, all of Ms. Pfeiffer's convictions must be reversed. For the reasons set forth in Argument I, the convictions must be vacated and judgment entered for the defendant. For the reasons set forth in Argument IV, the indictments must be dismissed.

Respectfully Submitted:  
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By her attorney,

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with  
the Massachusetts Rules of Appellate Procedure.

11/21/17  
Date

/s/Rebecca Jacobstein  
Rebecca A. Jacobstein

**ADDENDUM**

## United States Constitution

## Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

## Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Massachusetts Declaration of Rights

## Article 1

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

## Article 10

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary: but no part of the property of any individual can, with justice, be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. In fine, the people of this commonwealth are not controllable by any other laws than those to which their constitutional representative body have given their consent. And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor.

The legislature may by special acts for the purpose of laying out, widening or relocating highways or streets, authorize the taking in fee by the commonwealth, or by a county, city or town, of more land and property than are needed for the actual construction of such highway or street: provided, however, that the land and property authorized to be taken are specified in the act and are no more in extent than would be sufficient for suitable building lots on both sides of such highway or street, and after so much of the land or property has been appropriated for such highway or street as is needed therefor, may authorize the sale of the remainder for value with or without suitable restrictions.

## Article 12

No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.



## Article 26

No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments.

## Massachusetts General Laws

### G.L. c. 265, §1

Section 1. Murder committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life, is murder in the first degree. Murder which does not appear to be in the first degree is murder in the second degree. Petit treason shall be prosecuted and punished as murder. The degree of murder shall be found by the jury.

### G.L. c. 265, §13D½

Section 13D½. Whoever commits an offense set forth in section one, two, five or seven of chapter two hundred and sixty-six where said offense results in injury to a firefighter in the performance of his duty, shall be punished by imprisonment in the state prison for not more than ten years, or by a fine of not more than one thousand dollars and imprisonment in a jail or house of correction for not more than two and one-half years.

### G.L. c. 266, §1

Section 1. Whoever wilfully and maliciously sets fire to, burns, or causes to be burned, or whoever aids, counsels or procures the burning of, a dwelling house, or a building adjoining or adjacent to a dwelling house, or a building by the burning whereof a dwelling house is burned, whether such dwelling house or other building is the property of himself or another and whether the same is occupied or unoccupied, shall be punished by imprisonment in the state prison for not more than twenty years, or by imprisonment in a jail or house of correction for not more than two and one half years, or by a fine of not more than ten thousand dollars, or by both such fine and imprisonment. The words "dwelling house", as used in this section, shall mean and include all buildings used as dwellings such as apartment houses, tenement houses, hotels, boarding houses, dormitories, hospitals, institutions, sanatoria, or other buildings where persons are domiciled.

G.L. c. 266, §2

Section 2. Whoever wilfully and maliciously sets fire to, burns, or causes to be burned, or whoever aids, counsels or procures the burning of, a meeting house, church, court house, town house, college, academy, jail or other building which has been erected for public use, or a banking house, warehouse, store, manufactory, mill, barn, stable, shop, outhouse or other building, or an office building, lumber yard, ship, vessel, street car or railway car, or a bridge, lock, dam, flume, tank, or any building or structure or contents thereof, not included or described in the preceding section, whether the same is the property of himself or of another and whether occupied, unoccupied or vacant, shall be punished by imprisonment in the state prison for not more than ten years, or by imprisonment in a jail or house of correction for not more than two and one half years.

G.L. c. 266, §5

Section 5. Whoever wilfully and maliciously sets fire to, or burns or otherwise destroys or injures by burning, or causes to be burned or otherwise so destroyed or injured, or whoever aids, counsels or procures the burning of, a pile or parcel of wood, boards, timber or other lumber, or any fence, bars or gate, or a stack of grain, hay or other vegetable product, or any vegetable product severed from the soil and not stacked, or any standing tree, grain, grass or other standing product of the soil, or the soil itself, or any personal property of whatsoever class or character exceeding a value of twenty-five dollars, of another, or any boat, motor vehicle as defined in section one of chapter ninety, or other conveyance, whether of himself or another, shall be punished by imprisonment in the state prison for not more than three years, or by a fine of not more than five hundred dollars and imprisonment in a jail or house of correction for not more than one year.

G.L. c. 266, §5A

Section 5A. Whoever wilfully and maliciously attempts to set fire to, or attempts to burn, or aids, counsels or assists in such an attempt to set fire to or burn, any of the buildings, structures or property mentioned in the foregoing sections, or whoever commits any act preliminary thereto or in furtherance thereof, shall be punished by imprisonment in the state prison for not more than ten years, or by imprisonment in a jail or house of correction for not more than two and one half years or by a fine of not more than one thousand dollars.

The placing or distributing of any flammable, explosive or combustible material or substance or any device in or against any building, structure or property mentioned in the foregoing sections in an arrangement or preparation with intent eventually to wilfully and maliciously set fire to or burn such building, structure or property, or to procure the setting fire to or burning of the same shall, for the purposes of this section, constitute an attempt to burn such building, structure or property.

G.L. c. 266, §10

Section 10. Whoever, wilfully and with intent to defraud or injure the insurer, sets fire to, or attempts to set fire to, or whoever causes to be burned, or whoever aids, counsels or procures the burning of, a building, or any goods, wares, merchandise or other chattels, belonging to himself or another, and which are at the time insured against loss or damage by fire, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years.

SUPERIOR COURT MODEL JURY INSTRUCTIONS

§4.3.3 Supplemental Instruction

(a) *Failure to Extinguish or Report a Fire*

However, a person may have the required intent for arson if he or she negligently or accidentally causes a fire and then willfully and maliciously makes no attempt to extinguish or to report it. The necessary criminal state of mind for arson may be formed after a fire starts.

A N  
**A N A L Y S I S**  
 Of the First BOOK of  
**The Pleas of the Crown.**

**A**LL Persons whatsoever are liable to be punish'd as Criminal Offenders, unless they can excuse themselves, either,

1. In Respect of their Want of Reason: Or,
2. In Respect of their Subjection to the Power of others, ch. 1.

Offences, considered in relation to the Persons against whom they are committed, are either,

1. Such as are more immediately against God: Or,
2. Such as are more immediately against Man.

Offences more immediately against God are either by Common Law or by Statute.

Those at Common Law are either capital, or not capital.

The Capital are of three Kinds.

1. Heresy, ch. 2.
2. Witchcraft, ch. 3.
3. Sodomy, ch. 4.

Those not capital are either by Common Law or Statute.

Those by Common Law are of five Kinds,

1. Blasphemies against God, ch. 5. sect. 1.
2. Scoffing at the Scriptures, ch. 5. sect. 2.
3. Impostures in Religion, ch. 5. sect. 3.
4. Open Lewdness grossly scandalous, ch. 5. sect. 4.
5. Seditious Words against the established Religion, ch. 5. sect. 6.

Those by Statute are two-fold.

1. Such as are against Religion in general.
2. Such as are against the established Church.

Those against Religion in general are of four Kinds,

1. Profanations of the Lord's Day, ch. 6. sect. 1, 2, 3.
2. Profane swearing and cursing, ch. 6. sect. 4.
3. Drunkenness, ch. 6. sect. 5.
4. Reviling the Lord's Supper, ch. 6. sect. 6.

Those against the established Church are three-fold.

1. Such as concern all Persons in general.
2. Such as more immediately relate to those of the Popish Religion.
3. Such as more immediately regard Protestant Dissenters, ch. 16.

Those which concern all Persons in general, are either,

1. Against the Common Prayer, ch. 7. Or,
2. In accepting or holding an Office without due Conformity to the Church, ch. 8. Or,
3. In Teaching School without conforming to the Church, ch. 9. Or,
4. In not coming to Church, ch. 10, 11.

Those relating more immediately to Persons of the Popish Religion, are of four Kinds,

b

1. Po-

*An Analysis of the*

1. Popish Recusancy, ch. 12.
2. The Offence of saying or hearing of Mass, or other Popish Service, ch. 13.
3. The Offence of not making a Declaration against Popery, ch. 14.
4. The Offence of promoting or encouraging the Popish Religion; either,
  1. In giving or receiving Popish Education, ch. 15. sect. 1, 2, 3. Or,
  2. In professing the Popish Religion, ch. 15. from sect. 4. to sect. 15. Or,
  3. In buying or selling Popish Books, ch. 15. sect. 15.

Offences more immediately against Man are either more immediately against the King, or more immediately against the Subject.

Those more immediately against King are either capital, or not capital.

The capital are either,

1. High Treason: Or,
  2. Felonies.
- High Treason is either,
1. Such as is within 25 E. 3. and other Statutes grounded upon it, and explaining it: Or,
  2. Such as depends upon subsequent Statutes.

Of Treason within 25 Ed. 3. there are four Species.

1. That which immediately concerns the King, his Wife or Children, ch. 17. sect. 3, 4. &c.
2. That which concerns his Office in the Administration of Justice, ch. 17. sect. 46.
3. That which concerns his Seal, ch. 17. sect. 48.
4. That which concerns his Coin, ch. 17. sect. 54.

Of High Treason depending on subsequent Statutes, there are three Species.

1. Offences in upholding or favouring the Power of the Pope.
2. Offences against the Protestant Succession, ch. 17. sect. 85.

3. Offences in lifting Men without the King's Licence, ch. 17. sect. 86.

Of Offences in upholding or favouring the Power of the Pope, there are five Species.

1. Extolling the Pope's Power, ch. 17. sect. 72.
2. Putting in Ure Popish Bulls, ch. 17. sect. 75.
3. Perverting others, or being perverted to Popery, ch. 17. sect. 76.
4. Receiving Popish Orders or Education in Popish Seminaries, and not submitting, &c. ch. 17. sect. 79.
5. Refusing a second Tender of the Oaths, ch. 17. sect. 84.

Felonies more immediately against the King are of five Kinds,

1. Offences relating to the Coin or Bullion.
2. Offences against the King's Council, ch. 18. sect. 8.
3. The Offence of passing beyond Sea, to serve a Foreign Prince, ch. 18. sect. 10.
4. The Offence of imbezilling the King's Armour, ch. 18. sect. 12.
5. The Offence of relieving a Popish Priest, ch. 18. sect. 14.

Of Felony relating to the Coin or Bullion, there are three Species.

1. The Offence of debasing it, ch. 18. sect. 1.
2. The Offence of unlawfully diminishing it, ch. 18. sect. 2.
3. The Offence of endeavouring by extraordinary Means to increase it, ch. 18. sect. 7.

Of Offences more immediately against the King, not capital, there are two Kinds,

1. *Præmunire*.
2. *Misprison*.

Offences coming under the Notion of *Præmunire*, are either,

1. Against the Prerogative of the Crown: Or,
2. Against the Authority of the King and Parliament, ch. 19. sect. 44.

Of

## Chap. 39.

## Of Arson.

105

that the Offender meant only to commit a Trespass, as to beat the Party, *Kelynge* 30. *H. P. C.* 83. 84. *Crom.* 11. a. b. *Con. Dalt.* *Opinion*, That an Intention \* to commit a Rape, or such other Crime which is made Felony by Statute, and was a Trespass only at Common Law, will make a Man guilty of Burglary, as much as if such Offence were a Felony at Common Law, because where-ever a Statute makes any Offence Felony, it incidentally gives it all the Properties of a Felony at Common Law. *esp. 99.* *H. P. C.* 215. *Infra Ch.* 40. *sect. 3.* *H. H. P. C.* 451. *\* Sect. 481.* *expressly in Faint.*

## C H A P. XXXIX.

## Of Arson.

**A**RSON is a Felony at Common Law, in maliciously and voluntarily burning the House of another by Night or by Day. *H. H. P. C.* 465. *Bro. Coro.* 134. 155. *S. P. C.* 36. *3 Inst.* 66. *Dalt. ca.* 105. *2 Inst.* 183. *11 Co.* 29.

For the Better Explication whereof I shall consider :

1. What is such a House in which Arson may be committed.
2. Whether this Offence may be committed in the Offender's own House.
3. How much of the House ought to be burnt.
4. With what Degrees of Malice.

*Sect. 1.* As to the first Point, viz. What is such a House in which Arson may be committed; it seems agreed, That not only a Mansion-House, and the principal Parts thereof, but also any other House, and the Out-buildings, as Barns, and Stables, adjoining thereto; and also Barns full of Corn, whether they be adjoining to any House or not, are so far secured by Law, that the malicious Burning of them is Arson; and it is said, That in an Indictment they are well expressed by the Word *Domus*, without adding *Mansionalis*. *3 Inst.* 67. *4 Co.* 20. *Dalt. ca.* 105. *11 H.* 7. 1. *Bro. Coro.* 226. *S. P. C.* 36. *H. P. C.* 86. *H. H. P. C.* 567. 570.

*Sect. 2.* But it seems that at this Day the Burning of the Frame of a House, or of a Stack of Corn, &c. is not accounted Arson, because it cannot come under the Word *Domus*, which seems at present to be thought necessary in every Indictment of Arson; yet it is said, That anciently the Burning of a Stack of Corn was accounted Arson. And at this Day by *43 El.* 13. it is Felony without the Benefit of Clergy, wilfully and of Malice to burn or cause to be burned, or aid, procure, or consent to the burning of any Barn, Stack of Corn, or Grain, in the counties of Northumberland, Cumberland, Westmoreland and Durham. And by 22 and 23 *Ca.* 2. 7. it is Felony, in the Night-time, maliciously, unlawfully, and willingly to burn or cause to be burned any Stacks or Ricks of Corn, Hay, or Grain, Barns, or other Houses or Buildings, or Kilns, in any Place whatsoever: But the Offender may avoid Judgment of Death, by causing Transportation and may be proceeded against by any three Justices of Peace, according to the Method prescribed by the Statute, which is set forth more at large in Chap. 46. *3 Inst.* 67. *Stat. fo.* 16. *S. P. C.* 36. *Dalt. cap.* 105.

*Sect. 3.* As to the second Point, viz. Whether Arson may be committed in the Offender's own House, it seems clearly agreed, That one seized in Fee, or but possessed for Years, of a House standing by itself at

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a Distance from all others, cannot commit Felony in burning the same: Also it seems the much stronger Opinion, That a Man so seized or possessed of a House in a Town, who burns his own with an Intent to burn his Neighbour's, but in the Event burns his own only, is not guilty of Arson; for by the general Tenor of the Books speaking of this Offence, it seems to be supposed to be done in the House of another, and not of the Offender: Neither shall any Act, which is only a Crime in Respect of the Injury which it does, or may do, to another, be made a Felony by Reason of an Intention thereby to commit a Felony, if such Intention be not executed: However this is certainly an Offence highly punishable, in Regard of the Malice thereof, and the great Danger to the Publick which attends it, and the Offender may be severely fined and imprisoned during the King's Pleasure, and set on the Pillory, and bound to his good Behaviour during Life.

*Señ. 4.* As to the third Point, *viz.* How much of such House ought to be burnt, it seems to be clearly agreed, That neither a bare Intention to burn a House, nor even an actual Attempt to do it by putting Fire to Part of a House, will amount to Felony, if no Part of it be burnt; for the Indictment must have the Words *Incendit & combussit*: But it is certain, That if any Part of the House be burnt, the Offender is guilty of Felony, notwithstanding the Fire afterwards be put out, or go out of itself.

*Señ. 5.* As to the fourth Point, *viz.* With what Degrees of Malice such House ought to be burnt; it seems clear, That if the Fire happened through Negligence or Mischance, it cannot make him, who is the unfortunate Cause of it, guilty of Arson; for the Indictment must alledge the Offence to have been done *Voluntariè ex Malitiâ suâ præcogitatâ & felonice*. Yet if one maliciously intending only to burn the House of *A.* happen thereby to burn the House of *B.* it is certain that he may be indicted as having maliciously burned the House of *B.* for where a felonious Design against one Man misses its Aim, and takes Effect upon another, it shall have the like Construction as if it had been levelled against him who suffers by it.

## C H A P. XL.

### Of Felonies by Statute.

OFFENCES more immediately against the Subject, made capital by Statute, and not reduced to any of the foregoing Heads, are such as are committed;

1. Against Women.
2. Against the Rights of Marriage.
3. Against the Members of a Man's Body.
4. Against Records.
5. Against Cattle.
6. By Purveyors.
7. By Soldiers and Mariners.
8. By Hunters.

9. By

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R:1

**1184CR10211 Commonwealth vs. Pfeiffer, Melissa**

<b>Case Type</b>	Indictment	<b>Initiating Action:</b>	MURDER c265 §1
<b>Case Status</b>	Open	<b>Status Date:</b>	03/08/2011
<b>File Date</b>	03/08/2011	<b>Case Judge:</b>	
<b>DCM Track:</b>	C - Most Complex	<b>Next Event:</b>	

[All Information](#) [Party](#) [Charge](#) [Event](#) [Tickler](#) [Docket](#) [Disposition](#)**Party Information****Suffolk County District Attorney - Prosecutor**[Alias](#)**Party Attorney**

**Attorney** Higgins, Esq., Julie Sunkle  
**Bar Code** 632679  
**Address** Suffolk County District  
Attorney

One Bulfinch Place  
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**Attorney** Tilley, Esq., Colby M  
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**Address** Suffolk County District  
Attorney's Office

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**Phone Number** (617)619-4126

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[More Party Information](#)**Pfeiffer, Melissa - Defendant**[Alias](#)**Party Attorney**

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Ann

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44 Bromfield Street  
Boston, MA 02108

**Phone Number** (617)482-6212  
**Attorney** Kiley, Esq., Rebecca  
Catherine

**Bar Code** 660742  
**Address** Committee for Public Counsel  
Services

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Appeals Unit  
Boston, MA 02108

**Phone Number** (617)482-6212

[More Party Information](#)**Taunton State Hospital - Keeper of Record**[Alias](#)**Party Attorney**[More Party Information](#)**Stanton, Clerk, Hon. Joseph - Other interested party**

R:2

Alias

Party Attorney

[More Party Information](#)**Party Charge Information****Pfeiffer, Melissa** - Defendant**Charge # 1 :****265/1-0 - Felony** MURDER c265 §1**Original Charge** 265/1-0 MURDER c265 §1 (Felony)**Indicted Charge****Amended Charge****Charge Disposition**

Disposition Date

Disposition

02/10/2016

Guilty Verdict

02/10/2016

Guilty Verdict - Lesser Included

**Pfeiffer, Melissa** - Defendant**Charge # 2 :****265/15A/D-1 -** A&B WITH DANGEROUS WEAPON, SERIOUS BODILY INJURY c**Original Charge** 265/15A/D-1 A&B WITH DANGEROUS WEAPON,  
SERIOUS BODILY INJURY c**Indicted Charge****Amended Charge****Charge Disposition**

Disposition Date

Disposition

02/10/2016

Not Guilty Finding

**Pfeiffer, Melissa** - Defendant**Charge # 3 :****266/1-0 - Felony** ARSON OF DWELLING HOUSE c266 §1**Original Charge** 266/1-0 ARSON OF DWELLING HOUSE c266 §1  
(Felony)**Indicted Charge****Amended Charge****Charge Disposition**

Disposition Date

Disposition

02/10/2016

Guilty Verdict

03/21/2016

Dismissed - Request of  
Commonwealth**Pfeiffer, Melissa** - Defendant**Charge # 4 :****265/13D12-0 - Felony** FIREFIGHTER, INJURE c265 §13D½**Original Charge** 265/13D12-0 FIREFIGHTER, INJURE c265 §13D½  
(Felony)**Indicted Charge****Amended Charge****Charge Disposition**

Disposition Date

Disposition

02/10/2016

Guilty Verdict

**Pfeiffer, Melissa** - Defendant

**R:3****Charge # 5 :****265/13D12-0 - Felony** FIREFIGHTER, INJURE c265 §13D½**Original Charge** 265/13D12-0 FIREFIGHTER, INJURE c265 §13D½  
(Felony)**Indicted Charge**  
**Amended Charge****Charge Disposition**

Disposition Date

Disposition

02/10/2016

Guilty Verdict

**Events**

Date	Session	Location	Type	Event Judge	Result
03/10/2011 09:30 AM	Magistrate's Session		Arraignment		Held as Scheduled
04/07/2011 02:00 PM	Criminal 6		Pre-Trial Conference		Rescheduled
04/14/2011 02:00 PM	Criminal 6		Pre-Trial Conference		Held as Scheduled
05/10/2011 02:00 PM	Criminal 6		Pre-Trial Conference		Rescheduled
06/09/2011 09:00 AM	Criminal 6		Hearing on Dwyer Motion		Canceled
06/09/2011 02:00 PM	Criminal 6		Hearing on Dwyer Motion		Held as Scheduled
08/16/2011 02:00 PM	Criminal 6		Status Review		Rescheduled
08/23/2011 02:00 PM	Criminal 6		Status Review		Held as Scheduled
09/20/2011 02:00 PM	Criminal 6		Pre-Trial Hearing		Canceled
09/29/2011 02:00 PM	Criminal 6		Status Review		Rescheduled
10/11/2011 02:00 PM	Criminal 6		Status Review		Held as Scheduled
11/08/2011 09:00 AM	Criminal 6		Hearing RE: Discovery Motion(s)		Held as Scheduled
12/22/2011 02:00 PM	Criminal 6		Status Review		Held as Scheduled
02/09/2012 02:00 PM	Criminal 6		Final Pre-Trial Conference		Rescheduled
03/05/2012 09:00 AM	Criminal 6		Jury Trial		Canceled
03/06/2012 02:00 PM	Criminal 6		Hearing on Compliance		Held as Scheduled
04/05/2012 02:00 PM	Criminal 6		Hearing on Compliance		Held as Scheduled
05/01/2012 02:00 PM	Criminal 6		Status Review		Held as Scheduled
06/14/2012 09:00 AM	Criminal 6		Non-Evidentiary Hearing to Dismiss		Canceled

**R:4**

Date	Session	Location	Type	Event Judge	Result
06/14/2012 02:00 PM	Criminal 6		Status Review		Rescheduled
07/10/2012 02:00 PM	Criminal 6		Status Review		Held as Scheduled
07/25/2012 09:00 AM	Criminal 1		Hearing on Competency		Canceled
08/16/2012 02:00 PM	Criminal 6		Status Review		Rescheduled
08/30/2012 02:00 PM	Criminal 6		Status Review		Rescheduled
09/27/2012 02:00 PM	Criminal 6		Status Review		Rescheduled
10/02/2012 02:00 PM	Criminal 6		Status Review		Held as Scheduled
10/30/2012 02:00 PM	Criminal 6		Status Review		Held as Scheduled
12/04/2012 02:00 PM	Criminal 6		Status Review		Rescheduled
12/17/2012 09:00 AM	Criminal 6		Status Review		Held as Scheduled
01/22/2013 02:00 PM	Criminal 6		Non-Evidentiary Hearing to Dismiss		Rescheduled
01/29/2013 02:00 PM	Criminal 6		Status Review		Rescheduled
02/14/2013 02:00 PM	Criminal 6		Status Review		Held as Scheduled
03/12/2013 09:00 AM	Criminal 9		Non-Evidentiary Hearing to Dismiss		Not Held
03/12/2013 09:00 AM	Criminal 1		Non-Evidentiary Hearing to Dismiss		Not Held
03/12/2013 09:00 AM	Criminal 1		Evidentiary Hearing to Dismiss		Not Held
03/12/2013 09:00 AM	Criminal 6		Non-Evidentiary Hearing to Dismiss		Held as Scheduled
03/12/2013 02:00 PM	Criminal 6		Status Review		Canceled
06/20/2013 02:00 PM	Criminal 6		Hearing		Not Held
06/20/2013 02:00 PM			Hearing		Held as Scheduled
07/09/2013 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Rescheduled
07/17/2013 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Rescheduled
07/18/2013 02:00 PM	Criminal 6		Status Review		Rescheduled
08/06/2013 02:00 PM	Criminal 6		Status Review		Held as Scheduled
08/07/2013 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Rescheduled
08/29/2013 02:00 PM	Criminal 6		Status Review		Held as Scheduled

**R:5**

Date	Session	Location	Type	Event Judge	Result
09/10/2013 02:00 PM	Criminal 6		Final Pre-Trial Conference		Canceled
09/23/2013 09:00 AM	Criminal 6		Jury Trial		Rescheduled
10/10/2013 09:00 AM	Criminal 6		Status Review		Canceled
10/10/2013 02:00 PM	Criminal 6		Status Review		Rescheduled
10/23/2013 09:00 AM	Criminal 6		Jury Trial		Canceled
11/19/2013 02:00 PM	Criminal 6		Status Review		Rescheduled
11/26/2013 02:00 PM	Criminal 6		Status Review		Held as Scheduled
01/14/2014 02:00 PM	Criminal 6		Status Review		Not Held
01/23/2014 02:00 PM	Criminal 6		Status Review		Held as Scheduled
02/13/2014 09:00 AM	Criminal 6		Final Pre-Trial Conference		Canceled
03/11/2014 02:00 PM	Criminal 6		Status Review		Held as Scheduled
04/29/2014 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Not Held
05/06/2014 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Rescheduled
05/07/2014 12:00 PM	Criminal 9		Non-Evidentiary Hearing on Suppression		Rescheduled
05/19/2014 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Canceled
05/20/2014 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Canceled
06/03/2014 02:00 PM	Criminal 6		Status Review		Held as Scheduled
07/01/2014 02:00 PM	Criminal 6		Status Review		Held as Scheduled
07/02/2014 09:00 AM	Criminal 6		Status Review		Rescheduled
07/02/2014 02:30 PM	Criminal 6		Status Review		Held as Scheduled
07/08/2014 02:00 PM	Criminal 6		Hearing		Held as Scheduled
08/06/2014 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Rescheduled
08/07/2014 02:00 PM	Criminal 6		Status Review		Rescheduled
08/19/2014 02:00 PM	Criminal 6		Status Review		Held as Scheduled
09/25/2014 02:00 PM	Criminal 6		Status Review		Held as Scheduled
10/09/2014 02:00 PM	Criminal 6		Final Pre-Trial Conference		Canceled

**R:6**

Date	Session	Location	Type	Event Judge	Result
10/16/2014 02:00 PM	Criminal 6		Status Review		Held as Scheduled
10/20/2014 09:00 AM	Criminal 6		Jury Trial		Canceled
10/30/2014 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Held as Scheduled
12/02/2014 02:00 PM	Criminal 6		Status Review		Canceled
12/16/2014 11:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Rescheduled
01/14/2015 09:00 AM	Criminal 1		Status Review		Held as Scheduled
02/02/2015 02:00 PM	Criminal 1		Hearing		Canceled
04/03/2015 11:00 AM	Criminal 9		Hearing		Canceled
04/23/2015 02:00 PM	Criminal 6		Status Review		Canceled
05/15/2015 03:00 PM	Criminal 9		Hearing		Held as Scheduled
06/25/2015 09:00 AM	Criminal 9		Evidentiary Hearing on Suppression		Rescheduled
07/07/2015 02:00 PM	Criminal 6		Trial Assignment Conference		Held as Scheduled
07/23/2015 02:00 PM	Criminal 6		Status Review		Held as Scheduled
08/13/2015 02:00 PM	Criminal 6		Status Review		Held as Scheduled
09/03/2015 02:00 PM	Criminal 6		Status Review		Held as Scheduled
10/01/2015 02:00 PM	Criminal 6		Hearing		Not Held
10/06/2015 02:00 PM	Criminal 6	BOS-9th FL, CR 906 (SC)	Conference to Review Status	Locke, Hon. Jeffrey A	Held as Scheduled
10/13/2015 02:00 PM	Criminal 6	BOS-9th FL, CR 906 (SC)	Conference to Review Status	Locke, Hon. Jeffrey A	Held as Scheduled
10/13/2015 02:00 PM	Criminal 6		Final Pre-Trial Conference		Canceled
11/05/2015 09:00 AM	Criminal 6		Jury Trial		Canceled
11/12/2015 02:00 PM	Criminal 6	BOS-9th FL, CR 906 (SC)	Motion Hearing	Locke, Hon. Jeffrey A	Held as Scheduled
01/14/2016 02:00 PM	Criminal 5	BOS-8th FL, CR 817 (SC)	Final Pre-Trial Conference	Sanders, Hon. Janet L	Held as Scheduled
01/14/2016 02:00 PM	Criminal 6	BOS-9th FL, CR 906 (SC)	Final Pre-Trial Conference	Locke, Hon. Jeffrey A	Not Held
01/21/2016 03:00 PM	Criminal 5	BOS-8th FL, CR 817 (SC)	Hearing on Motion(s) in Limine	Sanders, Hon. Janet L	Held as Scheduled
01/28/2016 09:00 AM	Criminal 6	BOS-9th FL, CR 906 (SC)	Jury Trial		Not Held
01/28/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Held as Scheduled



**R:7**

Date	Session	Location	Type	Event Judge	Result
01/29/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Held as Scheduled
01/29/2016 09:00 AM	Criminal 6	BOS-9th FL, CR 906 (SC)	Jury Trial	Locke, Hon. Jeffrey A	Not Held
02/01/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Held as Scheduled
02/02/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Held as Scheduled
02/03/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Held as Scheduled
02/04/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Held as Scheduled
02/05/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Not Held
02/08/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Canceled
02/09/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Held as Scheduled
02/10/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Jury Trial	Sanders, Hon. Janet L	Held as Scheduled
03/21/2016 09:00 AM	Criminal 5	BOS-8th FL, CR 817 (SC)	Hearing for Sentence Imposition	Sanders, Hon. Janet L	Held as scheduled

**Ticklers**

Tickler	Start Date	Due Date	Days Due	Completed Date
Pre-Trial Hearing	03/10/2011	03/10/2011	0	03/21/2016
Final Pre-Trial Conference	03/10/2011	02/09/2012	336	03/21/2016
Case Disposition	03/10/2011	03/04/2012	360	03/21/2016

**Docket Information**

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
03/08/2011	Indictment returned as to offense #001 - Murder, 2nd Degree	1	
03/08/2011	MOTION by Commonwealth for arrest warrant to issue; filed & allowed. McIntyre, J.	2	
03/08/2011	Warrant on indictment issued		
03/08/2011	Warrant was entered onto the Warrant Management System 3/8/2011		
03/08/2011	Order of notice of finding of murder indictment		
03/10/2011	Defendant brought into court. Warrant Recalled.		
03/10/2011	Order of notice of finding of murder indictment with return of service.	3	
03/10/2011	Deft arraigned before Court. Indictment Read as to Offense #001.		
03/10/2011	RE Offense 1:Plea of not guilty		
03/10/2011	Deft waives reading of indictment as to Offenses #002-005.		

## R:8

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
03/10/2011	RE Offense 2:Plea of not guilty		
03/10/2011	RE Offense 3:Plea of not guilty		
03/10/2011	RE Offense 4:Plea of not guilty		
03/10/2011	RE Offense 5:Plea of not guilty		
03/10/2011	Bail set: \$1,000,000.00 Surety or \$100,000.00 Cash w/o/p. Bail warning read. Mittimus issued.		
03/10/2011	Assigned to track "C" see scheduling order		
03/10/2011	Tracking deadlines Active since return date		
03/10/2011	Case Tracking scheduling order (Gary D Wilson, Magistrate) mailed 3/10/2011		
03/10/2011	Continued to 5/10/2011 for hearing on PTC		
03/10/2011	Continued to 9/20/2011 for hearing on PTH		
03/10/2011	Continued to 2/9/2012 for hearing on FPTH		
03/10/2011	Continued to 3/5/2012 for hearing on PTD		
03/10/2011	Commonwealth files notice of appearance.	4	
03/10/2011	Commonwealth files notice of discovery.	5	
03/10/2011	Commonwealth files motion for funds	6	
03/10/2011	MOTION (P#6) allowed (Gary D Wilson, Magistrate) - J. Higgins, ADA - ERD/JAVS - J. Doyle, Attorney		
03/10/2011	Warrant canceled on the Warrant Management System 3/10/2011		
04/13/2011	Defendant files: Opposition to the Commonwealth's Motion for a Protective Order	7	
04/13/2011	Defendant files: Motion for Summons with Affidavit of Counsel	8	
04/14/2011	Defendant brought into court - PTC held. Memo to be filed.		
04/14/2011	Commonwealth files First Notice of Discovery	9	
04/14/2011	Commonwealth files Second Notice of Discovery	10	
04/14/2011	Commonwealth files Third Notice of Discovery	11	
04/14/2011	Commonwealth files Motion for a Protective Order	12	
04/14/2011	After hearing, MOTION (P#12) denied. Gaziano, RAJ		
04/14/2011	After hearing, MOTION (P#8) allowed as LAMPRON has been satisfied: Summons to issue with return date of 06/09/2011. Commonwealth to notify DCF.		
04/14/2011	Continued to 6/9/2011 by agreement for Dwyer hearing and filing of PTC report. Gaziano, RAJ - J. Higgins, ADA - N. King, Court Reporter - R. Doyle, Attorney		
04/25/2011	(Dwyer) Notice and Summons issued on 4/25/2011 to the Keeper of the Records of Department of Children and Families to produce records by 6/9/2011 to the Clerk of the Superior Court		
06/09/2011	Defendant not in court.		
06/09/2011	Hearing on DCF records held before Gaziano, RAJ. After hearing, the Court orders a new subpoena to issue with return date of July 29, 2011.		
06/09/2011	Commonwealth files: Response to the Defendant's Motion for the Defendant's DCF Records	13	
06/09/2011	Commonwealth files: Sixth Notice of Discovery	14	



R:9

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
06/09/2011	Continued to 8/16/11 by agreement for Status re: DCF records. Gaziano, RAJ - J. Higgins, ADA - J. Doyle, Atty - N. King, CR.		
06/10/2011	(Dwyer) Notice and Summons issued on 6/10/2011 to the Keeper of the Records of Department of Children and Families to produce records by 7/29/2011 to the Clerk of the Superior Court		
06/29/2011	Defendant's Ex Parte Motion for Funds filed.	15	
07/25/2011	The Court, Kottmyer, J. allows Paper #15 not to exceed \$2,500.00. Kottmyer, J. (Copy sent).		
07/28/2011	(Dwyer) Department of Children and Families received		
08/23/2011	Defendant not present - hearing on DCF records held before Kottmyer, J.		
08/23/2011	ORDER to Disclose, filed. Kottmyer, J.	16	
08/23/2011	Protective Order issued for defense counsel, filed.	17	
08/23/2011	Commonwealth files Seventh Notice of Discovery	18	
08/23/2011	Continued to 9/29/2011 by agreement for status re: DCF records. (Cancel 9/20/11 PTH) Kottmyer, J - J. Higgins, ADA - D. Cercone, Court Reporter - J. Doyle, Attorney		
08/31/2011	Defendant's Motion for Leave to File Request for an Order for Production of Records filed.	19	
09/07/2011	The Court, Kottmyer, J. allows Paper #19. See Order. (Parties notified with copy of Order).		
09/07/2011	Order on Defendant's Motion for Leave to File a Request for an Order for Production of Records filed by the Court, Kottmyer, J. (Parties along with attorney for DCF notified with copy).	20	
10/05/2011	Commonwealth files: Statement of the Case	21	
10/11/2011	Commonwealth files eighth notice of discovery	22	
10/11/2011	Continued to 11/8/2011 for hearing on discovery #906 (Frank M. Gaziano, Justice) J.Higgins,ADA; N.King,Court reporter		
10/12/2011	Records from Salem District Court Received. DWYER.		
10/31/2011	Salem District Court records mailed to Attorney Judith Morrison at DCF pursuant to Judge Kottmyer's Order. See Paper #20.		
11/08/2011	Defendant not present. Status Conference re: Records Held before Gaziano, RAJ.		
11/08/2011	Continued to 12/8/2011 for hearing on status re: redacted records from DCF. (Frank M. Gaziano, Regional Administrative Justice) - J. Higgins, ADA - N. King, Court Reporter - J. Doyle, Attorney		
11/14/2011	Other records from DCF received (Dwyer Room - unredacted - no view)		
11/16/2011	Protective Order issued for defense counsel access to presumptively privileged records. Salem District Court records redacted by DCF. Attorney for defendant may view records. Judge Gaziano permits one copy given to Attorney Doyle. (Delivered in hand).	23	
12/22/2011	Defendant not present. Status Conference held before Gaziano, RAJ.		
12/22/2011	Continued to 3/6/2012 for hearing on DCF Records and Discovery Compliance. Rule 17 Motion to be filed by 1/24/12. (Frank M. Gaziano, Regional Administrative Justice) - J. Higgins, ADA - N. King, Court Reporter - J. Doyle, Attorney		
01/24/2012	Defendant's Renewed Motion for Summons with Affidavit of Counsel filed.	24	
02/10/2012	The Court, Locke, RAJ. allows Paper #24 as endorsed. Subpoena to issue with return date of 3/6/12. Locke, RAJ.		

**R:10**

<b>Docket Date</b>	<b>Docket Text</b>	<b>File Ref Nbr.</b>	<b>Image Avail.</b>
02/13/2012	(Dwyer) Notice and Summons issued on 2/13/2012 to the Keeper of the Records of Department of Children and Families to produce records by 3/5/2012 to the Clerk of the Superior Court	25	
03/06/2012	Records from Department of Children and Families received (Dwyer)		
03/06/2012	Defendant not present .		
03/06/2012	Commonwealth files 10 th notice of discovery . Continued to 4/5/12 at 2:00pm for status by agreement. Locke, RAJ - J. Higgins, ADA - N. King, CR - J. Doyle, ATTY	26	
04/03/2012	Commonwealth files Eleventh Notice of Discovery	27	
04/05/2012	Defendant not present		
04/05/2012	Deft files Motion to Clarify and Amend Protective Order	28	
04/05/2012	Hearing re: P#28 held before Locke, RAJ. After hearing the Court orders Attorney Doyle may release his client's birth name to her.		
04/05/2012	Protective Order issued for defense counsel, filed. The Court orders Attorney Doyle may view records. The Commonwealth may view records if defense counsel does not object and if a protective order is executed.	29	
04/05/2012	Continued to 5/1/2012 by agreement for filing of further Dwyer motions and any motions to dismiss. Locke, RAJ - J. Higgins, ADA - N. King, Court Reporter - J. Doyle, Attorney		
05/01/2012	Defendant not present. Hearing on paper #32 held before Locke, RAJ.		
05/01/2012	Deft files: Motion to dismiss indictments.	30	
05/01/2012	Deft files: Motion to suppress statements with affidavit and authorities.	31	
05/01/2012	Commonwealth files: Twelfth notice of discovery.	33	
05/01/2012	Deft files: Motion to amend protective orders.	32	
05/01/2012	After hearing MOTION (P#32) allowed as endorsed ( Locke, RAJ). Copy of endorsement and record mailed to Atty 5/1/2012.		
05/01/2012	Continued to 6/14/2012 by agreement for hearing re: scheduling of motions to dismiss and suppress. (Locke, RAJ) - J. J. Higgins, ADA - N. King, Court Reporter - J. Doyle, Attorney		
06/22/2012	Evaluation report filed by Taunton State Hospital. ( Special File ).		
06/25/2012	Defendant not present		
06/25/2012	Request for Commitment of a Female Detainer for Observation Pursuant to M.G.L. Chapter 123, S. 18A, filed and allowed. Ball, J	34	
06/25/2012	ORDER of Committment of a Female Detainee for Observation, filed. Ball, J	35	
06/25/2012	ORDERED: Deft committed per 123:18 to the Taunton State Hospital for a period not to exceed thirty (30) days. Commitment expires on 7/25/12. Ball, J		
07/10/2012	Defendant not present, continued by agreement until 8/16/2012 for Status. Connors, J. - J. Higgins, ADA - J. Doyle, Attorney - F. Leroux, Court Reporter.		
07/30/2012	Evaluation per MGL Ch. 123, Section 18(a) by Dr. Sarah Beszterczey, Ph.D. of Taunton State Hospital received and placed in special file.	37	
08/16/2012	Defendant present, brought in court. Status conference held before Connors, J. Case continued until 8/30/2012 by agreement for status re: testing. Connors, J - J. Higgins, ADA - R. LeRoux, Court Reporter - J. Doyle, Attorney		
10/30/2012	Defendant not present. Status conference held before Locke, RAJ		
10/30/2012	Deft files Notice of Intent to Introduce Evidence of Mental Condition.	38	

**R:11**

<b>Docket Date</b>	<b>Docket Text</b>	<b>File Ref Nbr.</b>	<b>Image Avail.</b>
10/30/2012	Continued to 12/4/2012 by agreement for status re: defense expert evaluation and status re: Commonwealth's expert. Locke, RAJ - J. Higgins, ADA - N. King, Court Reporter - J. Doyle, Attorney		
11/14/2012	Defendant's Motion for Summons with Affidavit of Counsel filed and allowed. Subpoena to issue. Return date 11/30/12. Locke, RAJ.	39	
11/16/2012	Defendant not present		
11/16/2012	Evaluation report filed by Tae Woo Park, MD from the Suffolk County House of Correction at South Bay	40	
11/16/2012	Request for commitment of female detainee for observation pursuant to MGL CH. 123, Sec.18(a), filed.	41	
11/16/2012	MOTION (P#41) allowed. Ball, J		
11/16/2012	ORDERED: Deft committed per 123:18(a), filed. Ball, J	42	
11/21/2012	(Dwyer) Notice and Summons issued on 11/21/2012 to the Keeper of the Records of Taunton State Hospital to produce records by 11/30/2012 to the Clerk of the Superior Court	43	
11/29/2012	Hospital records from Taunton State Hospital received		
12/17/2012	Defendant not present. Habe issued but deft not medically cleared to travel. Status conference held before Locke, RAJ. Case continued to 1/22/13 by agreement for filing amended motion to dismiss and Commonwealth's motion for independent mental health evaluation. Locke, RAJ- J. Higgins, ADA - N. King, Court Reporter - J. Doyle, Attorney		
12/20/2012	ORDER of Commitment of a Female Detainee for Observation (pursuant to M.G.L. Chapter 123, Section 18), filed. Ball, J (faxed to Dept of Correction at South Bay)	44	
12/20/2012	Evaluation report filed by Sara K. Bexzterczey, Ph.D. (Special File)	45	
02/14/2013	Defendant not in Court		
02/14/2013	Commonwealth's motion for the defendant to submit to an examination by an independent evaluator filed and allowed after hearing Locke, J	46	
02/14/2013	Commonwealth's Oppostion to defendant's amended motion to dismiss indictment filed and (IMPOUNDED) Locke, J	47	
02/14/2013	Case continued by agreement to 3/12/13 for a hearing Re: Motion to Dismiss (Crm 713) and continued by agreement to 3/12/13 for a hearing Re: Mental health status (Ctrm 906 at 2:00 pm) (Habe Issued to S. Bay). Locke, RAJ., J. Higgins, ADA., J. Doyle, Atty., N. King, Court Reporter		
03/12/2013	Tracking deadlines Extended by Bishop/Fuller/Dwyer		
03/12/2013	Defendant brought into court		
03/12/2013	Commonwealth files Notice of Independent Evaluator	48	
03/12/2013	Hearing on motion to dismiss held before Locke, RAJ, matter taken under advisement		
03/12/2013	Scheduling conference held. Continued to 9/10/2013 by agreement for FPTC and 9/23/13 for trial. Continued to 7/9/13 at 9:00 AM by agreement for hearing on motion to suppress in the 9th Criminal Session (Ctrm 713) Locke, RAJ - J. Higgins, ADA - N. King, Court Reporter - J. Doyle, Attorney		
03/12/2013	Defendant's Amended Motion to Dismiss Indictment filed.	49	
03/12/2013	Defendant's Reply Memorandum of Points and Authorities in Support of Amended Motion to Dismiss Indictments filed.	50	
05/23/2013	Memorandum of Decision and Order on Defendant's Motion to Dismiss filed by the Court, Locke, RAJ denying defendant's motion. (Parties notified with copy).	51	

## R:12

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
05/31/2013	Defendant's Ex Parte Motion for Further Funds for Mental Health Services filed and allowed. Ball, J. (Copy given in hand to attorney).	52	
06/19/2013	Defendnt's Ex Parte Motion to Substitute Provider of Mental Health Expert Services Nunc Pro Tunc filed.	53	
06/20/2013	Defendant not present. Defendant's presence waived		
06/20/2013	Case continued by agreement to 7/18/13 at 2:00 for a status hearing Re: Trial date of 10/23/13 that is tenatively scheduled. Case also scheduled by agreement to 8/7/13 for a hearing Re: Motion to Suppress in the 9th Criminal Session (Full day hearing). Kottmyer, J., J. Higgins and T. Anderson, ADA's., J. Doyle, Atty., W. Greenlaw, Court Reporter		
07/25/2013	Commonwealth files: Motion for Continuance of October 23, 2013 Trial Date	54	
08/06/2013	Defendant not present - presence waived. Status conference re: records held before Connors, J.		
08/06/2013	Hearing held on P#54. After hearing, MOTION (P#54) allowed. Connors, J.		
08/06/2013	Continued to 8/29/2013 by agreement for status re: records. (Presence waived) (Cancel 10/23/13 trial date) Connors, J - J. Higgins, ADA - E. Tyler, Court Reporter - J. Doyle, Atty.		
08/27/2013	Judgment filed by the Court, Duffly, J. denying defendnat's petition.	55	
08/29/2013	Defendant not present. Presence Waived. Status conference held before Connors, J.		
08/29/2013	Case continued to 10/10/2013 by agreement for status re: Dr. Fife's evaluation. Presence Waived. Connors, J - J. Higgins, ADA - ERD - J. Doyle, Attorney		
09/03/2013	Notice of assembly of the record on Appeal received from the SJC.	56	
09/03/2013	Notice received from the SJC (see endorsed motion)	57	
11/26/2013	Defendant not present, Presence waived, Status conference held before Locke, RAJ, continued by agreement until 1/14/2014 @ 2:00pm for status re: Dr. Fife's evaluation. Locke, J - J. Higgins, ADA - N. King, CR - J. Doyle, Attorney.		
01/17/2014	Judgment After Rescript filed by the Court, Cordy, J. of the SJC. Judgment affirmed.	58	
01/23/2014	Defendant not present - presence waived. Status conference re: records held before Kottmyer, J. Continued to 2/13/2014 by agreement at 2:00pm for status re: report of Dr. Fife. Rule 36 waived. Presence waived. Kottmyer, J. - J. Higgins, ADA - T. Anderson, ADA - J. Doyle, Attorney - N. King, Court Reporter		
02/11/2014	Psychiatric records from Pshcyiatric evaluation report from Alison Fife, M. D. received (In special file)		
03/11/2014	Defendant not present - scheduling conference held before Kottmyer, J.		
03/11/2014	By agreement, the following dates were scheduled: 4/29/2014 and 5/6/2014 for motion to supress hearings in the 9th Criminal Session (Ctrm 713) 10/09/2014 for FPTC and 10/20/2014 for PTD in the 6th Criminal Session (Ctrm 906). Kottmyer, J - J. Higgins, ADA - N. King, Court Reporter - J. Doyle, Atty		
06/03/2014	Defendant not in Court. Presence waived, Status Conference held.		
06/03/2014	Defendant files Ex Parte Motion for Further Funds for Mental Health Expert Services.	59	
06/03/2014	MOTION (P#59) allowed (Jeffrey A. Locke, Justice). (Copy given to Counsel in hand).		

**R:13**

<b>Docket Date</b>	<b>Docket Text</b>	<b>File Ref Nbr.</b>	<b>Image Avail.</b>
06/03/2014	Commonwealth files Motion for unredacted copies of the Defendant's Mental Health Evaluation. ORDERED SEALED as Endorsed Locke-RAJ.	60	
06/03/2014	Continued until 7/1/2014 by agreement; Status Conference (Ctrm 906, 2:00pm presence waived).		
06/03/2014	Continued until 8/6/2014 by agreement Hearing; re: Motion to Suppress. (Ctrm 713, Process needed for Defendant) (Paper #60 Needed for Hearing) (Est. 1/2 to 1 Full Day hearing). Locke-RAJ, J. Higgins, ADA. - J. Doyle, Atty. - N. King, CR.		
07/01/2014	Defendant not in Court, Presence Waived. Status Conference held before Locke-RAJ.		
07/01/2014	Commonwealth files Motion for Additional Examination of the Defendant.	61	
07/01/2014	Continued until 7/2/2014 by Order of the Court; re: Status Conference (Ctrm 906, Presence Waived). Locke-RAJ. - J. Higgins, ADA. - T. Anderson, ADA. - N. King, CR.		
07/02/2014	Defendant not in Court; re: Status Conference held before Locke-RAJ.		
07/02/2014	Defendant files Opposition to Commonwealth's Motion for Additional Examination of the Defendant and Request for Evidentiary hearing.	62	
07/02/2014	Defendant files Motion for Funds for Transcript.	63	
07/02/2014	After hearing: MOTION (P#63) allowed (Jeffrey A. Locke, Justice). (Copy given to Counsel this day in-hand)		
07/02/2014	Continued until 7/8/2014 by agreement; Further Hearing re: Motion (P#61) (Ctrm 906 @ 2:00pm). Habe Issued to South Bay. Locke-RAJ. - J. Higgins, ADA. - T. Anderson, ADA. - J. Doyle, Atty. - N. King, CR.		
07/08/2014	Defendant brought into Court, hrg re: Motions held before Connors J.		
07/08/2014	After hrg, Commonwealth's Motion (P#61) taken under advisement - Connors, J.		
07/08/2014	Continued by agreement to 8/7/14 for status conference (Ctrm 906) 2PM - Locke, RAJ - J.Higgins, ADA - F.LeRoux, CR - J.Doyle, Atty		
07/11/2014	Ruling of Connors, J. Denying Commonwealth's Motion for additional examination of the defendant. (ADA's J.Higgins, T.Anderson and Atty J.Doyle notifiedwith copy of Ruling)	64	
07/11/2014	Commonwealth's MOTION (P#61) denied (Thomas A. Connors, Justice).		
08/06/2014	Defendant not present, event not held. (ADA on trial this day)		
08/06/2014	Continued to 8/19/2014 by agreement for hearing status re: scheduling of motion to suppress in (Ctrm.906 at 2:00PM - Deft presence waived) DATE Cancelled for 8/7/14 event in 906. Connors, J. - J. Doyle, Attorney (Thomas A. Connors, Justice)		
08/19/2014	Defendant not in court, Presence waived this day, status conference re: scheduling held before Connors, J.		
08/19/2014	Case continued until 9/25/2014 by agreement for status conference (906, 2pm, Deft excused).		
08/19/2014	Case continued until 10/30/14 by agreement for hearing re: Motion to Supress in the 9th criminal session ctm 713(Est. 1/2 Day Hearing). Habe needed to South Bay		
08/19/2014	10/9/14 FPTH and 10/20/14 Trial are cancelled. Connors, J. - J. Higgins, ADA. - J. Doyle, Atty. - P. Pietrilla, C.R.		
09/25/2014	Defendant not present, presence waived, status conference held before Connors, J.		
09/25/2014	Case continued until 10/16/2014 for status re expert's report(906, 2pm, deft excused).		

R:14

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
09/25/2014	Case continued until 12/2/2014 by agreement for hearing re status re trial date. Connors, J. - J. Higgins, ADA. - J. Doyle, Atty. - P. Pietrella, C.R.		
10/16/2014	Defendnat not present in Court. Presence waived.		
10/16/2014	Deft files Report to Court regarding Mental Health Evaluation	64.1	
10/16/2014	Deft files Report of Dr. Alison Fife and Dr. Frank Cataldo (REDACTED) (filed under seal)	64.2	
10/16/2014	Deft files Report of Dr. Alison Fife and Dr. Frank Cataldo (UNREDACTED) (filed under seal)	64.3	
10/16/2014	Case continued to previously scheduled date for motion to suppress on 10/30/2014. - Locke, RAJ - ADA J. Higgins/T. Anderson -- Atty J. Doyle - Pietrilla, CR		
10/21/2014	Deft files Ex Parte Motion for Funds For Forensic Science Consultant	65	
10/27/2014	Commonwealth files Opposition to Defendant's Motion to Suppress Statements.	66	
10/27/2014	Deft files Opposition to Commonwealth's Motion for Unredacted Copies of the Defendant's Forensic Mental Health Evaluations.	67	
10/30/2014	Defendant brought into court.		
10/30/2014	Commonwealth files Request for Production of Raw Data to be Provided to Dr. Jamie Krauss.	68	
10/30/2014	Continued by agreement to 12/16/2014 for Further hearing on Motion to Suppresss. Ames, J. - J. Higgins and T. Anderson ADA - J. Doyle, Attorney.		
11/04/2014	Order :P Defendant to Provide to Dr. Jamie Krauss Raw Data From Dr. Frank DiCataldo's Assessment of the Defendant.	69	
12/16/2014	Defendant not present, continued by Order of the Court until 1/14/2015 for Status Before Ames, J. Courtroom 1006. Ames, J. - J. Higgins, ADA - Javs.		
12/29/2014	MOTION for Unredacted Copies of the Defendant's Forensic Mental Health Evaluation (P#60) denied Without Prejudice as endorsed. Ames, J. Copies mailed to both parties 12/30/14.		
01/14/2015	Defendant not present		
01/14/2015	Case continued until 2/2/2015 by order of court for hearing at 2pm in Room 1006 before Ames, J.		
01/14/2015	Commonwealth files Motion for court to reconsider Comm's motion for unredacted copies of the Deft's forensic mental health evaluations. Lauriat, J. - J. Higgin, ADA. - J. Doyle, Atty. - JAVS.	70	
05/15/2015	Defendant not present		
05/15/2015	After hearing, MOTION to reconsider (P#70) denied as endorsed.		
05/15/2015	Continued by agreement to 6/25/2015 for Further hearing on Motion to Suppress. Ames, J. - J. Hiigins and T. Anderson, ADA - J. Doyle, Attorney - Javs.		
05/26/2015	Deft files Motion to File Under Seal Ex-Parte Motion for Funds Forensic Arson Consultant.	71	
05/26/2015	Deft files Ex-Parte Motion for Funds Forensic Arson Consultant.	72	
06/24/2015	Deft files Motion for Bill of Particulars.	73	
06/24/2015	Deft files Motion for Discovery of Exculpatory Evidence.	74	
06/25/2015	Defendant not present. Attorney James Doyle represents to the Court he will not be calling witness Dr. DiCataldo. Motion to Suppress taken under advisement.		



## R:15

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
06/25/2015	Continued by agreement to 6/7/2015 for Trial Assignment Sixth Session Courtroom 906. Ames, J. - J. Higgins, ADA - J. Doyle via telephone, Attorney.		
07/02/2015	Deft files motion in limine to exclude invalid " Scientific" Evidence: Arson	75	
07/07/2015	Defendant brought into court. Trial assignment held before Lauriat, J		
07/07/2015	MOTION (P#65) allowed as endorsed, Lauriat J. (copy sent to Atty. J. Doyle via email)		
07/07/2015	Continued to 10/13/2015 by agreement for FPTC @2PM (Ctrm 906) (Habe to S. Bay needed ) Lauriat, J - J. Higgins, ADA - J. Doyle, Atty - C. Sproul , CR		
07/07/2015	Continued to 11/ 5/2015 by agreement re: Trial (Habe to S. Bay needed) (Ctrm 906) Lauriat, J - J. Higgins, ADA - J. Doyle, Atty - C. Sproul , CR		
07/07/2015	Continued to 7/23/2015 by agreement @2Pm for Status Conference (Ctrm 906) Habe to issue to South Bay for 7/23/15 event. Lauriat, J - J. Higgins, ADA - J. Doyle, Atty - C. Sproul, CR		
07/23/2015	Defendant not present, present in lockup, presence waived in courtroom		
07/23/2015	Continued to 8/13/2015 by agreement re further status. (906, 2pm, habe issued) Lauriat, J. - J. Higgins, ADA. - J. Doyle, Atty. - N. King, CR		
08/10/2015	Defendant files Motion for Summons.	76	
08/13/2015	Defendant brought into court, status held before Lauriat, J		
08/13/2015	MOTION (P#76) allowed Lauriat, J. Summons to issue, returnable on 9-2-15		
08/13/2015	Deft files Motion for summons	77	
08/13/2015	MOTION (P#76) allowed Lauriat, J. Summons to issue, returnable on 9-2-15		
08/13/2015	Continued to 9/3/2015 by agreement re status(906, 2pm, habe issued). Lauriat, J. - J. Higgins, ADA. - J. Doyle, Atty. - N. King, CR.		
08/18/2015	Summons Issued for Records to Suffolk County Sheriff's Department and Malcolm Rogers, M.D., returnable by 09/02/2015.		
08/21/2015	Deft files Notice re: Intervening Authority: Comm v Pfeiffer, SUCR2011-10211 (Copy forwarded to Justice Ames at the request of deft)	78	
08/26/2015	Deft files Ex Parte motion for further funds for Investigative services	79	
09/03/2015	Defendant brought into court .Status conference held before Lauriat,J		
09/03/2015	Deft files Motion regarding interference with witness access	80	
09/03/2015	MOTION (P#79) allowed as endorsed. Lauriat, J (Copy forwarded to Atty Doyle via email)		
09/03/2015	Continued to 10/1/2015 by agreement status re records/deft's motion for bill of particulars(906, 2pm). Counsel for Sheriffs Dept to appear. Habe issued. Lauriat, J. - J. Higgins, ADA. - J. Doyle, Atty. - JAVS.		
09/14/2015	Other records from Suffolk County Sheriff's Department received		
09/22/2015	Suffolk County Sheriff's Department opposition to Deft's Motion for Summons Pursuant to Mass R Crim P. 17	81	
10/01/2015	Event Result: The following event: Hearing scheduled for 10/01/2015 02:00 PM has been resulted as follows: Result: Held Reason: Request of Commonwealth. Continued to 10-6-15 re status		

R:16

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	Lauriat, J.		
10/05/2015	MEMORANDUM & ORDER:  of Ames, J. dated 9/30/15 on deft's motion to suppress statements filed. ADA J. Higgins and Atty. J. Doyle notified 10/5/15 via email.	82	
10/06/2015	Event Result: The following event: Conference to Review Status scheduled for 10/06/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled. COntinued to 10/13/15. N. King, CR		
10/06/2015	Defendant 's Motion for discovery expert evidence	83	
10/06/2015	Defendant 's EX PARTE Motion for further funds	84	
10/06/2015	Endorsement on Motion for Further funds, (#84.0): ALLOWED  as endorsed. Locke, RAJ. Sealed. (Copy given to Atty Doyle via email)		
10/06/2015	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 10/13/2015 02:00 PM Final Pre-Trial Conference.		
10/09/2015	The following form was generated: Copy of P# 82 and Endorsement on P# 31 sent to parties with Notice A Clerk's Notice was generated and sent to: Attorney: James M Doyle, Esq. Attorney: Julie Sunkle Higgins, Esq.		
10/13/2015	Defendant 's Motion in limine for Judicial Notice of Authoritative learned treatise filed	85	
10/13/2015	Event Result: The following event: Conference to Review Status scheduled for 10/13/2015 02:00 PM has been resulted as follows: Result: Held as Scheduled		
10/13/2015	General correspondence regarding Defendant Motion for Bill of Particulars (P#73) see endorsment of Locke, RAJ	0	
10/13/2015	General correspondence regarding Defendant's Motion (P#74) Moot as endorsed Locke, RAJ		
10/13/2015	General correspondence regarding Defendant's Motion (P#80) see endorsement of Locke, RAJ		
10/13/2015	Endorsement on Motion for Discovery: Expert Evidence, (#83.0): ALLOWED		
10/13/2015	Commonwealth 's Motion to continue November 5,2015 Trial Date, filed	86	
10/13/2015	Endorsement on Motion to continue November 5, 2015 Trial Date (Trial 1/28/16)( FPTC 1/14/16) Locke, RAJ, (#87.0): ALLOWED		
10/13/2015	Event Result: The following event: Jury Trial scheduled for 11/05/2015 09:00 AM has been resulted as follows: Result: Canceled Reason: Court Order		
10/13/2015	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 01/14/2016 02:00 PM Final Pre-Trial Conference.		
10/13/2015	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 01/28/2016 09:00 AM Jury Trial.  Applies To: Suffolk House of Correction (South Bay) (Holding Institution)		
11/12/2015	Defendant not in court - excused. Status conference held  Case has date of 1/14/16 Final Pre Trial Conference  Locke, RAJ - J. Higgins, ADA - J. Nayle, Atty - N. King C/R		
11/12/2015	Commonwealth 's Notice of 15th discovery.	87	
11/12/2015	Commonwealth 's Motion for Reciprocal Discovery.	88	



## R:17

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
11/12/2015	Endorsement on Motion for Reciprocal Discovery., (#88.0): ALLOWED After hearing, as endorsed, "as to defense file experts opinion, deferred to trial for Dr. DiCataldo's report consistent with Blairdell et al. Lock, RAJ."		
12/14/2015	Defendant 's EX PARTE Motion for further funds for investigative services filed	89	
12/22/2015	Commonwealth 's Notice of discovery 9th(supplemental)	90	
01/13/2016	Event Result: The following event: Final Pre-Trial Conference scheduled for 01/14/2016 02:00 PM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
01/13/2016	Event Result: The following event: Jury Trial scheduled for 01/28/2016 09:00 AM has been resulted as follows: Result: Not Held Reason: Transferred to another session		
01/14/2016	Brought into Court. Sanders, J. - J. Higgins & C. Tilley, ADA's - J. Doyle, Atty - R. LeRoux, C./R. The following event: Final Pre-Trial Conference scheduled for 01/14/2016 02:00 PM has been resulted as follows: Result: Held as Scheduled		
01/14/2016	Joint Pre-Trial Memorandum filed:	91	
01/14/2016	Commonwealth 's Notice of discovery - sixteen, filed	92	
01/14/2016	Commonwealth 's Request for individual voir dire questions for purposes of jury impanelment, filed	93	
01/14/2016	Commonwealth 's Motion for judicial inquiry into criminal history records of potential trial jurors ect. (see mtn) filed	94	
01/14/2016	Commonwealth 's Motion in limine to exempt family members from the general order of sequestration, filed	95	
01/14/2016	Commonwealth 's Motion in limine to allow a family photograph of victim, filed	96	
01/14/2016	Commonwealth 's Motion in limine to admit autopsy photos, filed	97	
01/14/2016	Commonwealth 's Motion for a view, filed	98	
01/14/2016	Commonwealth 's Motion to correct docket, filed	99	
01/14/2016	Defendant 's Motion in limine for judicial notice of authoritative learned treatise, filed	100	
01/14/2016	Defendant 's Motion in limine to exclude certain prejudicial evidence, filed	101	
01/14/2016	Defendant 's Motion in limine to exclude invalid "scientific" evidence: Arson, filed	102	
01/14/2016	Endorsement on Motion for funds for investigative services, (#89.0): ALLOWED (copies issued)		
01/14/2016	Commonwealth 's Motion for production of medical records (pages 1 thru 8) filed and allowed along with copies of ORDERS. Sanders, J (subpoenas to be issued by ADA. J. Higgins)	103	
01/19/2016	Commonwealth 's Submission to the court of documents in advance of 1/21/16 hearing	104	
01/19/2016	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 01/21/2016 03:00 PM Hearing on Motion(s) in Limine.		
01/19/2016	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 01/28/2016 09:00 AM Jury Trial.		
01/20/2016	Medical Records received from MGH		
01/21/2016	Brought into Court. FPTC held. Sanders, J. - J. Higgins, & C. Tilley, ADA's - J. Doyle, Atty - R. LeRoux, C./R.		
01/21/2016	Defendant 's Motion for production of medical records, filed after hearing, allowed. Sanders, J.	105	
01/22/2016	ORDER: re: records, filed.	106	

**R:18**

<b>Docket Date</b>	<b>Docket Text</b>	<b>File Ref Nbr.</b>	<b>Image Avail.</b>
01/22/2016	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 01/28/2016 09:00 AM Jury Trial.		
01/22/2016	Notice and Summons (Dwyer) issued to Keeper of Records c/o Joyce O'Connor Taunton State Hospital 60 Hodges Avenue Taunton, Massachusetts 02780 of Taunton State Hospital to produce records by 01/28/2016 to the Clerk of the Superior Court. (Regarding P#105 and P#106)		
01/22/2016	Medical Records received from Cataldo Ambulance Service		
01/22/2016	Medical Records received from Cataldo Ambulance Service		
01/25/2016	Commonwealth 's Motion in limine to admit prior bad act evidence	107	
01/25/2016	Commonwealth 's Motion for individual voir dire questions for purposes of jury impanelment	108	
01/25/2016	Medical Records received from Whidden Memorial Hospital	109	
01/27/2016	Commonwealth 's Request for voir dire questions	110	
01/27/2016	Commonwealth 's Motion in limine for testimony of William Brewer	111	
01/27/2016	Endorsement on Motion in limine for judicial notice of authoritative learned treatise, (#100.0): ALLOWED Sanders, J.		
01/28/2016	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 01/29/2016 09:00 AM Jury Trial. *****DAY TO DAY UNTIL CONCLUSION OF TRIAL*****		
01/28/2016	Brought into Court for Trial. Commonwealth moves for trial. Defendant answers ready. Court Sanders J. orders sixteen (16) jurors impaneled. Sanders, J. - J. Higgins & C. Tilley, ADA's - J. Doyle, Atty - R. LeRoux, C./R.		
01/28/2016	Commonwealth 's Response to defense's motion re: interference with witness access	112	
01/28/2016	Endorsement on Motion to correct docket as to indictment # 002 Ch. 265 sec. 15A(c), (#99.0): ALLOWED		
01/29/2016	Brought into Court for further impanelment. Court suspends impanelment due to lack of jurors. To be continued to 2/1/16 Sanders, J. - F. LeRoux, C./R.		
02/01/2016	Brought into Court. Court conducts individual voir dire with two (2) jurors after hearing juror #78 in S# 11 is challenged. Impanelment concluded with sixteen (16) jurors sworn / indictments formally read / Opening statements / Evidence begins. Sanders, J. - J. Higgins & C. Tilley, ADA's - J. Doyle, Atty - R. LeRoux, C./R.		
02/01/2016	Commonwealth 's Request for pre charge jury instructions	113	
02/01/2016	Defendant 's Response to Commonwealth's pre charge request	114	
02/01/2016	Commonwealth 's Response to defendant's motion in limine re: William Brewers testimony, after hearing allowed. Sanders, J.	115	
02/01/2016	Commonwealth 's Response to Defendants motion in limine to exclude certain prejudicial evidence	116	
02/01/2016	Endorsement on Motion in limine to exclude certain prejudicial evidence, after hearing denied in part as endorsed (see record) Sanders, J., (#101.0): DENIED		
02/01/2016	Endorsement on Motion in limine to admit prior bad act evidence, after hearing, allowed. Sanders, J., (#107.0): ALLOWED		
02/01/2016	Endorsement on Motion in limine regarding testimony of William Brewer after hearing, allowed as to statements made and prior. Sanders, J., (#111.0): ALLOWED		
02/02/2016	Brought into court. Trial resumes with sixteen (16) jurors present before Sanders, J. Court conducts individual voir dire of juror #16 in S#15 N.W. after hearing, dismissed. R. LeRoux, C./R.		
02/02/2016	Endorsement on Motion regarding protective order, after hearing, Court allows copies of records to be provided to Commonwealth. Sanders, J., (#32.0): Other action taken		
02/02/2016	Commonwealth 's Response to defendant's motion in limine to exclude invalid "scientific" evidence	117	
02/03/2016	Brought into Court. Trial resumes with fifteen (15) jurors present before Sanders, J. Jurors go on view of crime scene. R. LeRoux, C./R.		

R:19

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
02/03/2016	Melissa Pfeiffer's Memorandum re: DCF records	118	
02/03/2016	Mental Health Records received from Commonwealth of Massachussetts Dept of Mental Health		
02/04/2016	Brought into Court. Trial resumes with fifteen (15) jurors present before Sanders, J. Mtn (P#102) no action taken as endorsed. R. LeRoux, C./R.		
02/04/2016	Event Result: The following event: Jury Trial scheduled for 02/05/2016 09:00 AM has been resulted as follows: Result: Not Held Reason: By Court prior to date		
02/08/2016	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 02/09/2016 09:00 AM Jury Trial.		
02/08/2016	Event Result: The following event: Jury Trial scheduled for 02/08/2016 09:00 AM has been resulted as follows: Result: Canceled Reason: Court Closure		
02/09/2016	Brought into Court. Court dismisses Juror #14 in S#2 BBS due to illness. Trial resumes with fourteen (14) jurors present before Sanders, J. Commonwealth rests its case in chief. Defendant rests. Charge conference held. M. Wrighton, C./R.		
02/09/2016	Commonwealth 's Request for jury instructions	119	
02/09/2016	Defendant 's Request for jury instructions	120	
02/09/2016	Commonwealth 's Motion in limine to exclude expert testimony of Dr. DiCataldo and to conduct a voir dire filed and after hearing, see record as endorsed. Sanders, J.	121	
02/09/2016	Business Records received from Cataldo Ambulance Service		
02/09/2016	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 02/10/2016 09:00 AM Jury Trial. DAY to DAY until Completion of Trial		
02/09/2016	Defendant 's Motion for requiring finding of not guilty at the close of Commonwealth's case filed and after hearing, denied as explained in open Court. Sanders, J.	122	
02/09/2016	Defendant 's Motion for requiring finding of not guilty at the close of all evidence, after hearing, denied. Sanders, J.	123	
02/10/2016	Brought into Court. Trial resumes with fourteen (14) jurors present before Sanders, J. Trial proceeds with closing arguments and charge. Jury reduced to twelve (12) members. J#45 in S#4 B.S. / J# 91 in S#7 M.P. designated as alternate jurors.Deliberations begin at 12:15. R/ LeRoux, C./R.		
02/10/2016	Commonwealth 's Request for supplemental requests for jury instructions filed and after hearing, denied. Sanders, J.	124	
02/10/2016	Endorsement on Motion for requiring finding of not guilty, upon reconsideration , allowed in part as to Off. # 003 - ABDW see endorsement, Sanders, J., (#123.0): DENIED		
02/10/2016	Offense Disposition: Charge #2 A&B WITH DANGEROUS WEAPON, SERIOUS BODILY INJURY c265 §15A (c) (i) Date: 02/10/2016 Method: Jury Trial Code: Not Guilty Finding Judge: Sanders, Hon. Janet L		
02/10/2016	Offense Disposition: Charge #1 MURDER c265 §1 Date: 02/10/2016 Method: Jury Trial Code: Guilty Verdict Judge: Sanders, Hon. Janet L  Charge #2 A&B WITH DANGEROUS WEAPON, SERIOUS BODILY INJURY c265 §15A (c) (i) Date: 02/10/2016 Method: Jury Trial Code: Not Guilty Finding Judge: Sanders, Hon. Janet L		

R:20

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	<p>Charge #3 ARSON OF DWELLING HOUSE c266 §1  Date: 02/10/2016  Method: Jury Trial  Code: Guilty Verdict  Judge: Sanders, Hon. Janet L</p> <p>Charge #4 FIREFIGHTER, INJURE c265 §13D½  Date: 02/10/2016  Method: Jury Trial  Code: Guilty Verdict  Judge: Sanders, Hon. Janet L</p> <p>Charge #5 FIREFIGHTER, INJURE c265 §13D½  Date: 02/10/2016  Method: Jury Trial  Code: Guilty Verdict  Judge: Sanders, Hon. Janet L</p>		
02/10/2016	Verdict affirmed, verdict slip filed  as to Off. #001 Murder II	125	
02/10/2016	Verdict affirmed, verdict slip filed  as to Off. #003	126	
02/10/2016	Verdict affirmed, verdict slip filed  as to Off. # 004	127	
02/10/2016	Verdict affirmed, verdict slip filed  as to Off. # 005	128	
02/10/2016	ORDER: Court orders execution of sentence stayed until 3/21/16, Sanders, J.	134	
02/11/2016	Habeas Corpus for defendant issued to Suffolk House of Correction (South Bay) returnable for 03/21/2016 09:00 AM Hearing for Sentence Imposition.		
03/16/2016	Defendant 's Motion for required finding, post conviction, filed	129	
03/16/2016	Melissa Pfeiffer's Memorandum in aid of sentencing, filed	130	
03/21/2016	Defendant notified of right of appeal to the Appellate Division of the Superior Court within ten (10) days.		
03/21/2016	Defendant notified of right of appeal to the Appeals Court within thirty (30) days.		
03/21/2016	Defendant warned as to submission of DNA G.L. c. 22E, § 3		
03/21/2016	Brought into court. Commonwealth moves for sentencing. Sanders, J. - J.Higgins & C.Tilley, ADA's - J. Doyle, Atty - M. Wrighton, C./R.		
03/21/2016	<p>Correction Sentence Date: 03/21/2016 Judge: Sanders, Hon. Janet L</p> <p>Charge #: 1 MURDER c265 §1  Life with Parole  State Prison Sentence-Not Less Than: 15 Years, 0 Months, 0 Days</p> <p>Served Primary Charge</p> <p>Committed to MCI - Framingham</p> <p>Credits 1900 Days</p>		
03/21/2016	<p>Correction Sentence Date: 03/21/2016 Judge: Sanders, Hon. Janet L</p> <p>Charge #: 4 FIREFIGHTER, INJURE c265 §13D½  State Prison Sentence</p>		

R:21

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
	<p>State Prison Sentence-Not Less Than: 3 Years, 0 Months, 0 Days</p> <p>State Prison Sentence-Not More Than: 5 Years, 0 Months, 0 Days</p> <p>Served Concurrently Charge # 1 Case 1184cr10211</p> <p>Charge #: 5 FIREFIGHTER, INJURE c265 §13D½ State Prison Sentence State Prison Sentence-Not Less Than: 3 Years, 0 Months, 0 Days</p> <p>State Prison Sentence-Not More Than: 5 Years, 0 Months, 0 Days</p> <p>Served Concurrently Charge # 1 Case 1184cr10211</p> <p>Committed to MCI - Framingham</p> <p>Credits 1900 Days</p> <p>Financials Docket Type Victim/Witness Assessment on felony G.L. c. 258B, § 8. Amount \$90.00</p>		
03/21/2016	<p>Issued on this date:</p> <p>Mitt For charges #s 004 &amp;005 Sent On: 03/21/2016 12:05:05</p>		
03/21/2016	<p>Issued on this date:</p> <p>Mitt For Off. #001 Sent On: 03/21/2016 12:11:34</p>		
03/21/2016	<p>Offense Disposition: Charge #1 MURDER c265 §1 Guilty of Lesser included off of Murder II Date: 02/10/2016 Method: Jury Trial Code: Guilty Verdict Judge: Sanders, Hon. Janet L</p> <p>Charge #2 A&amp;B WITH DANGEROUS WEAPON, SERIOUS BODILY INJURY c265 §15A (c) (i) Date: 02/10/2016 Method: Jury Trial Code: Not Guilty Finding Judge: Sanders, Hon. Janet L</p> <p>Charge #3 ARSON OF DWELLING HOUSE c266 §1 Date: 03/21/2016 Method: Other Court Event Code: Dismissed - Request of Commonwealth Judge: Sanders, Hon. Janet L</p> <p>Charge #4 FIREFIGHTER, INJURE c265 §13D½ Date: 02/10/2016 Method: Jury Trial Code: Guilty Verdict Judge: Sanders, Hon. Janet L</p> <p>Charge #5 FIREFIGHTER, INJURE c265 §13D½ Date: 02/10/2016 Method: Jury Trial Code: Guilty Verdict Judge: Sanders, Hon. Janet L</p>		
03/21/2016	Disposed for statistical purposes		
03/21/2016	<p>Commonwealth oral motion Court orders Off. #003 dismissed, Defendant assenting therteto</p>		

R:22

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
03/21/2016	Commonwealth 's Submission of sentencing memorandum	131	
03/21/2016	Notice of appeal filed  Applies To: Doyle, Esq., James M (Attorney) on behalf of Pfeiffer, Melissa (Defendant)	132	
03/21/2016	Defendant 's Motion to withdraw as counsel by Atty James Doyle. (referred to CPCS)	133	
04/06/2016	Defendant 's Motion for Jail Credit	135	
04/22/2016	Issued on this date:  Corrected mittimus issued re: Jail credit		
04/27/2016	Issued on this date:  Mitt For Sentence (First 6 charges) Sent On: 04/27/2016 10:37:45  Corrected Mittimus II		
06/14/2016	Court Reporter Nancy King is hereby notified to prepare one copy of the transcript of the evidence of 03/12/2013 09:00 AM Non-Evidentiary Hearing to Dismiss 1st Notice 6/14/16 2nd Notice 12/7/16		
06/15/2016	Court Reporter Richard LeRoux is hereby notified to prepare one copy of the transcript of the evidence of 01/21/2016 03:00 PM Hearing on Motion(s) in Limine, 01/28/2016 09:00 AM Jury Trial, 01/29/2016 09:00 AM Jury Trial, 02/02/2016 09:00 AM Jury Trial, 02/01/2016 09:00 AM Jury Trial, 02/03/2016 09:00 AM Jury Trial, 02/04/2016 09:00 AM Jury Trial		
06/15/2016	Court Reporter Mary Wrighton is hereby notified to prepare one copy of the transcript of the evidence of 02/10/2016 09:00 AM Jury Trial, 02/09/2016 09:00 AM Jury Trial, 03/21/2016 09:00 AM Hearing for Sentence Imposition		
06/16/2016	OTS is hereby notified to provide the JAVS transcript of the proceedings of 10/30/2014 09:00 AM Evidentiary Hearing on Suppression.		
08/09/2016	Appeal: JAVS DVD/CD Received from OTS 10/30/14		
08/19/2016	Pro Se Defendant 's Request for Waiver, Substitution or State payment of fees and costs with Affidavit of Indigency (\$90 VWF). Filed. (copy w/ docket to Sanders-J)	137	
09/21/2016	CD of Transcript of 02/09/2016 09:00 AM Jury Trial, 03/21/2016 09:00 AM Hearing for Sentence Imposition received from Mary Wrighton.		
09/28/2016	Endorsement on of Indigency, (#137.0): Other action taken All Fees (Including Victim Witness and DNA Fees) are waived in light of sentence Defendant is Serving (Copy Sent to Defendant)		
12/22/2016	CD of Transcript of 03/12/2013 09:00 AM Non-Evidentiary Hearing to Dismiss received from Nancy King.		
02/06/2017	Court Reporter Richard LeRoux is hereby notified to prepare one copy of the transcript of the evidence of 02/10/2016 09:00 AM Jury Trial		
03/21/2017	CD of Transcript of 01/21/2016 03:00 PM Hearing on Motion(s) in Limine, 01/28/2016 09:00 AM Jury Trial, 01/29/2016 09:00 AM Jury Trial, 02/01/2016 09:00 AM Jury Trial, 02/02/2016 09:00 AM Jury Trial, 02/03/2016 09:00 AM Jury Trial, 02/04/2016 09:00 AM Jury Trial, 02/10/2016 09:00 AM Jury Trial received from LeRoux.		
03/22/2017	Notice to counsel with transcript(s)		
03/30/2017	Appeal: notice of assembly of record sent to the Appeals Courtl  Applies To: Stanton, Clerk, Hon. Joseph (Other interested party); Kiley, Esq., Rebecca Catherine (Attorney) on behalf of Pfeiffer, Melissa (Defendant); Zanini, Esq., John P (Attorney) on behalf of Suffolk County District Attorney (Prosecutor)		
03/30/2017	Appeal: Statement of the Case on Appeal (Cover Sheet).		
04/04/2017	Rebecca Ann Jacobstein, Esq.'s Notice of appearance. filed	138	

R:23

Docket Date	Docket Text	File Ref Nbr.	Image Avail.
04/06/2017	Commonwealth 's Notice of entry of appeal. filed. in accordance with Massachusetts Rule of Appellate Procedure 10(a)(3), please note that the above-referenced case was entered in this court on March 30, 2017.	139	
04/12/2017	Offense Disposition:: Charge #1 MURDER c265 §1 On: 02/10/2016 Judge: Hon. Janet L Sanders By: Jury Trial Guilty Verdict - Lesser Included  Charge #2 A&B WITH DANGEROUS WEAPON, SERIOUS BODILY INJURY c265 §15A (c) (i) On: 02/10/2016 By: Jury Trial Not Guilty Finding  Charge #3 ARSON OF DWELLING HOUSE c266 §1 On: 03/21/2016 By: Other Court Event Dismissed - Request of Commonwealth  Charge #4 FIREFIGHTER, INJURE c265 §13D½ On: 02/10/2016 By: Jury Trial Guilty Verdict  Charge #5 FIREFIGHTER, INJURE c265 §13D½ On: 02/10/2016 By: Jury Trial Guilty Verdict		
06/07/2017	Defendant 's Motion to View and Copy and Impounded Material (Copy with Docket sent to Sanders,J)	140	
06/13/2017	Endorsement on Motion to View and Copy Impounded Material, (#140.0): ALLOWED (Copy and Notice Sent A Jacobstein, ATTY)		<a href="#">Image</a>

**Case Disposition**

Disposition	Date	Case Judge
Disposed by Jury Verdict	03/21/2016	

JUL 2011-10211  
INDICTMENT #001*Commonwealth of Massachusetts*

SUFFOLK, SS.

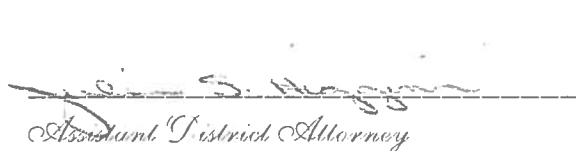
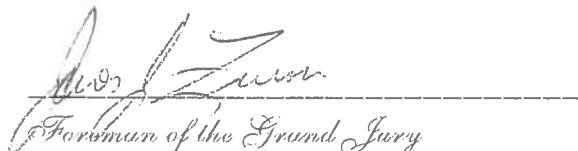
At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS,  
begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of March in the year of  
our Lord two thousand eleven.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

**MELISSA PFEIFFER,**

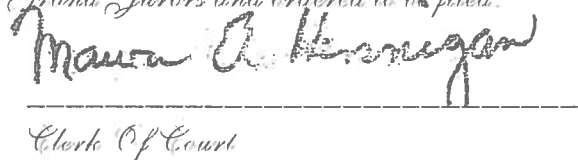
on December 24, 2010, did assault and beat Crystal Blanchard with intent to murder her and by such assault and beating  
did kill and murder Crystal Blanchard and the Jurors further say that the defendant is charged with murder in the  
second degree.

A TRUE BILL

  
Assistant District Attorney  
Foreman of the Grand JurySuperior Court Department - Criminal Business  
MAR 08 2011

March, Filing, 2011

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

  
Clerk Of Court



SUCR 2011-10211  
INDICTMENT #002

R:25  
Assault and Battery by Means of a Dangerous Weapon  
C. 265, §15A

*Commonwealth of Massachusetts*

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS,  
begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of March in the year of  
our Lord two thousand eleven.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

**MELISSA PFEIFFER,**

on December 24, 2010, did commit an assault and battery upon one Paul Pitts, by means of a certain dangerous weapon,  
and thereby did cause serious bodily injury to said Paul Pitts.

A TRUE BILL

*[Signature]*  
Assistant District Attorney

*[Signature]*  
Foreman of the Grand Jury

*Superior Court Department - Criminal Business*

*March, Filing, 2011*

MAR 08 2011

*Returned into said Superior Court by the Grand Jurors and ordered to be filed.*

*[Signature]*  
Clerk Of Court

SUCK 2011- 10211  
INDICTMENT #003

Arson (Dwelling)  
C. 266 §1

# Commonwealth of Massachusetts

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS,

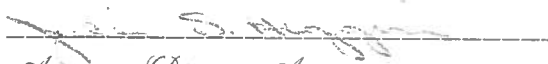
begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of March in the year of  
our Lord two thousand eleven.

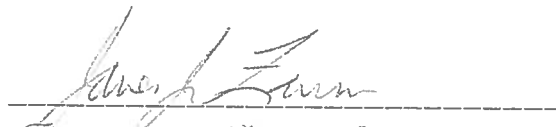
THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

**MELISSA PFEIFFER,**

on December 24, 2010, wilfully and maliciously did set fire to, burn or cause to be burned, a dwelling house, at 295 Spruce Street in Chelsea, within the County of Suffolk, the property of one James Perry (owner) and Melissa Pfeiffer (tenant).

A TRUE BILL

  
Assistant District Attorney

  
Foreman of the Grand Jury

Superior Court Department - Criminal Business  
MAR 08 2011

March, Felling, 2011

Returned into said Superior Court by the Grand Jurors and ordered to be filed.

  
Clerk of Court

SUCR 2011-10211  
INDICTMENT # 004

R:27

Firefighters Injuries Resulting from Criminal Offenses  
C.265 §13D 1/2

*Commonwealth of Massachusetts*

SUFFOLK, SS.

At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS,

begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of March in the year of  
our Lord two thousand eleven.

THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

**MELISSA PFEIFFER,**

on December 24, 2010, wilfully and maliciously did set fire to and burn a dwelling house, specifically 295 Spruce Street in  
Chelsea, within the County of Suffolk, as set forth in G.L. c.266 §1, and said offense did result in injury to a firefighter,  
Robert Brown, in the performance of his duty.

A TRUE BILL

*John S. Higgins*  
Assistant District Attorney

*James J. Zurn*  
Foreman of the Grand Jury

*Superior Court Department - Criminal Business*

*March, Filing, 2011*

*Returned into said Superior Court by the Grand Jurors and ordered to be filed.*

*Maura A. Hennigan*  
Clerk of Court

*Commonwealth of Massachusetts*

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SUFFOLK, SS.


At the SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT FOR CRIMINAL BUSINESS,  
begun and holden at the CITY OF BOSTON, within and for the County of Suffolk, on the first Monday of March in the year of  
our Lord two thousand eleven.

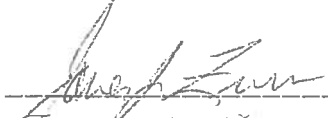
THE JURORS for the COMMONWEALTH OF MASSACHUSETTS on their oath present that

**MELISSA PFEIFFER,**

on December 24, 2010, wilfully and maliciously did set fire to and burn a dwelling house, specifically 295 Spruce Street in  
Chelsea, within the County of Suffolk, as set forth in G.L. c.266 §1, and said offense did result in injury to a firefighter,  
Wayne Ulwick, in the performance of his duty.

A TRUE BILL

  
Assistant District Attorney

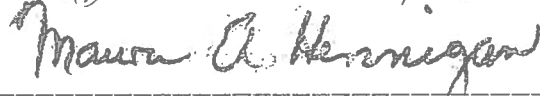
  
Foreman of the Grand Jury

*Superior Court Department - Criminal Business*

*March, Sitting, 2011*

**MAR 08 2011**

*Returned into said Superior Court by the Grand Jurors and ordered to be filed.*

  
Clerk of Court

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

SUPERIOR COURT DEPARTMENT  
NO. SUCR-2011-10211

COMMONWEALTH

v.

MELISSA PFEIFFER

AMENDED MOTION TO DISMISS INDICTMENT

Ms. Melissa Pfeiffer, by counsel, respectfully moves this honorable Court for an Order dismissing so much of the pending indictment as charges murder.

As grounds for this Motion, counsel states as follows, under pains and penalties of perjury.

A. Insufficiency of Evidence Before Grand Jury

*The evidence presented to the grand jury precluded a finding of probable cause to support the "willful and malicious" burning of a dwelling required to support the charge of murder. Commonwealth v. McCarthy, 385 Mass. 160 (1982).*

1. Melissa Pfeiffer is charged with murder in the second degree solely on a theory of felony murder predicated on the underlying felony of arson of a dwelling, M.G.L. c. 266, § 1.
2. The crime of arson requires proof that the arsonist acted "willfully and maliciously" to burn a dwelling house. " Commonwealth v. Nioziolek, 380 Mass. 513 (1980); Commonwealth v. Mezzanotti, 26 Mass.App.Ct. 522 (1988).

5/22/13 After hearing, DENIED. SEE Memo of Decision. CACQ. 1.4.

3. The sum of the Commonwealth's proof before the grand jury, taken in the light most favorable to the Commonwealth, indicated that Ms. Pfeiffer set a match to clothing of her roommate, the father of her children, William Brewer, in a fit of anger directed at Brewer. It was Brewer's claim before the grand jury that Ms. Pfeiffer had done this before, with the result on that prior occasion that his clothing (but nothing else) had been damaged.
4. A person acting willfully "[I]ntends both his or her conduct and the resulting harm." F. MCINTYRE (ED.) MASSACHUSETTS SUPERIOR COURT CRIMINAL PRACTICE JURY INSTRUCTIONS, VOL. I, 272-273. Therefore "[T]he requirement of willfulness means that accidentally or negligently caused burnings are not arson." *Id.*
5. In this case, while the evidence presented before the grand jury might conceivably justify an indictment for manslaughter on a theory of reckless conduct, that same evidence explicitly *precluded* in every respect, a finding that Ms. Pfeiffer willfully and maliciously intended to burn a dwelling or other building.
6. Where evidence before the grand jury not only fails to show probable cause to believe that a defendant possessed at the time of acting the "willful and malicious" intent that the charging statute requires, but flatly *refutes* any claim that the defendant possessed that intent, the evidence before the grand jury is insufficient, and the charge of murder, with its attendant mandatory minimum sentence must be dismissed. Commonwealth v. McCarthy, 385 Mass. 160 (1982). Related statutes, which punish burning of personal property, do not

support a charge of felony murder., however, cannot supply the malice element of murder.

7. This case presents the situation that the Appeals Court warned against (but did not find) in Commonwealth v. Riley, 73 Mass.App.Ct. 721 (2009). Judicial action that sanctions the failure to produce evidence sufficient to show probable cause for *any* theory of murder does not involve the court in a review of “subtle gradations of offenses” Commonwealth v. Goldstein, 54 Mass.App.Ct. 863, 868 (2002); rather it protects the defendant’s Article XII guarantee against being convicted of a crime for which he has not been indicted by a grand jury.

*B. Due Process Violation / Undue Influence Over the Grand Jury Process*

*In two significant respects the conduct of the prosecution in presenting this matter to the grand jury undermined the integrity of the grand jury and requires dismissal of the indictment. Commonwealth v. O’Dell, 392 Mass. 445 (1984).*

8. Failure to instruct the grand jury. First, the Commonwealth compelled the grand jurors to deliberate in ignorance of the elements of the substantive offense for which the defendant was ultimately indicted. During the pendency of the grand jury process the defense repeatedly requested<sup>1</sup> in writing that the grand jurors be instructed regarding the indispensable elements of felony murder and therefore, of the crime of arson which in this case is an indispensable element of the crime of felony murder, in some neutral and authoritative form such as the Superior Court standard jury instructions.
9. The Commonwealth refused to provide the grand jurors with any guidance regarding the elements of the offense, and as a direct result of this refusal

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<sup>1</sup> Correspondence regarding the defendant’s request that instructions be given and legal advice to the grand jurors recorded is at Attachment “A” to this motion.

obtained an indictment for murder based exclusively on conduct which beyond dispute did not indicate that “the defendant intended both the conduct and its harmful consequences” Commonwealth v. Schuchardt, 408 Mass. 347, 352 (1990). By this course of action, the Commonwealth kept the grand jurors in ignorance of the elements of the offense which the grand jurors were evaluating, and then exploited the grand jurors’ ignorance to obtain an indictment for an offense punishable by a mandatory life sentence. Even if it were possible to argue that another, lesser, offense such as the burning of personal property could somehow support a felony murder finding of malice, that argument would be irrelevant, since the grand jurors were not given the guidance necessary to evaluate that claim either. But see, Commownealth v. Matchett, 382 Mass. 492 (1982).

10. The defendant’s history is one of childhood sexual victimization, post-traumatic stress, cognitive handicaps, and psychiatric diagnoses: all features that would be expected to figure in any discretionary sentencing decision outside the context of the mandatory minimum sentence required by an indictment for murder. The indictment for murder, in contrast to an indictment for manslaughter works a qualitative change in the defendant’ situation indistinguishable from the change in the sentencing environment imposed on a juvenile defendant by indictment as an adult. See, Commonwealth v. Walczak, \_\_\_Mass.\_\_\_(December 12, 2012).
11. The prejudice inflicted on the defendant by this indictment cannot be cured by the petit jury’s consideration of the charges, since the pending murder



indictment and the risk of the mandatory life sentence that trial on that indictment entails deprives the defendant of due process in the critical pretrial, plea bargaining stage of the proceedings. *Missouri v. Frye*, \_\_U.S.\_\_, 132 S.Ct.\_\_(2012).

12. The state and federal constitutions require that a grand jury have some idea of the factual underpinnings required by the legal elements of the charges it is evaluating before the process can comport with due process. This grand jury could have had no idea of the elements of the felony murder theory, and to require the defendant to plea bargain or face trial on this indictment denies the defendant due process of law.
13. Second, in direct contrast to its refusal to provide the grand jurors with elementary legal guidance regarding the requirements of the substantive offense, the Commonwealth gratuitously supplied the grand jurors with instructions that imposed invalid restrictions on the grand jurors' ability to evaluate fully the testimony of William Brewer, who was the only alleged percipient witness to several elements of the Commonwealth's narrative. (Tran. Grand Jury, 1/18/11, at 42.)
14. Brewer provided the grand jurors with a narrative in which Pfeiffer, after an argument, set fire to Brewer's clothes, and he claimed that Pfeiffer had done this to his property once before.
15. In fact, the person with a proven record of taking domestic vengeance by utilizing arson was Brewer himself, who had served a lengthy state prison sentence for a *series* of arsons committed in order to avenge his defeat in a fight

over a romantic partner. Brewer presented a highly laundered version of this history to the grand jury, portraying himself essentially as a victim: "Some guys pushed me in front of a car over a girl. I spent six months in a wheelchair, and when I got out of the wheelchair I did some arsons." (Tran. Grand Jury, 1/18/11, at 37.) The prosecution did not correct his laconic and misleading statement of those events.

16. Even Brewer's laconic and misleading account of these prior arsons should have been available to the grand jurors for their independent evaluation of whether Brewer himself, in a pattern consistent with his behavior on the prior occasions, had avenged himself after his fight with Ms. Pfeiffer by setting the fire. Nothing in the physical evidence, then or now, contradicts the inference of Brewer's culpability.
17. The prosecutor in the grand jury forbade the grand jurors to take account of this potential inference, telling them that they were prohibited from considering Brewer's series of arson convictions "in determining, intent, motive, knowledge, state of mind, identification, plan or pattern, common scheme or course of conduct." A legal direction embargoing the use of this exculpatory evidence is the functional equivalent of a failure to present that evidence, and comprises the exercise of an undue influence over the functioning of the grand jury and impairs the integrity of the grand jury. Cf., Commonwealth v. O'Dell, *supra*. Of course, even if the prosecutor had corrected Brewer's account of his prior arsons and provided the full record, the prosecutor's instruction would have put the corrected version beyond the grand jurors' practical reach.

18. The insufficiency of the evidence, the denial of appropriate legal guidance to the grand jurors, and the preclusion of grand jury consideration of exculpatory evidence, each independently and together, violated the defendant's rights to due process of law under the Fourteenth Amendment of the Constitution of the United States, Hicks v. Oklahoma, 447 U.S. 443 (1980), and Article XII of the Massachusetts Declaration of Rights.

WHEREFORE, the defendant respectfully requests that this motion be granted, and that the pending indictment be dismissed.

Respectfully submitted,  
MELISSA PFEIFFER,  
By her counsel:

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James M. Doyle, 553716  
CARNEY & BASSIL  
20 Park Plaza, No. 1405  
Boston, MA 02116  
617 686 027

CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Motion was served by mail on the office of Julie Higgins, Esq., Assistant District Attorney, this \_\_\_ day of January, 2013.

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James M. Doyle

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

SUPERIOR COURT DEPARTMENT  
NO. SUCR-2011-10211

COMMONWEALTH

V.

MELISSA PFEIFFER

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF AMENDED  
MOTION TO DISMISS INDICTMENT

1. Due process requires a grand jury that knows what it is doing; this grand jury did not. As far as this grand jury knew, every act with some causal connection to a death could be charged as murder.

Under Article 12 of the Massachusetts Declaration of Rights and G.L. c. 263, § 4, a defendant may not be indicted for a felony unless a grand jury, based on sufficient evidence, finds probable cause to believe that the defendant committed the crime charged. See *Commonwealth v. Moran*, 453 Mass. 880, 884-887 (2009); *Lataille v. District Court of E. Hampden*, 366 Mass. 525, 531-532 (1974); *DeGolyer v. Commonwealth*, 314 Mass. 626, 632-633 (1943); *Commonwealth v. Harris*, 231 Mass. 584, 585 (1919). The Supreme Judicial court has long recognized, and three Justices have recently noted in their concurring opinion in *Commownwealth v. Walkzac*, \_\_Mass.\_\_ (December 12, 2012) the principle that:

"The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." *Jones v. Robbins*, 8 Gray 329, 344 (1857). See generally 4 W.R. LaFave, J.H. Israel, N.J. King, & O.S. Kerr, *Criminal Procedure* § 15.1(a), at 379 (3d ed. 2007) (LaFave) ("shielding role" of grand jury revered in American colonies). And we also have recognized that "[a] grand jury finding of probable cause is necessary if indictments are to fulfil their traditional function as an effective protection 'against unfounded criminal prosecutions.'" *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982), quoting *Lataille v. District Court of E. Hampden*, *supra* at 532.

A grand jury may not indict an individual for an offense unless evidence is presented as to each of its elements. See *Commonwealth v. Moran*, *supra* at 884. This requirement would be pointless unless the grand jury evaluating the evidence had some understanding of what the elements of the offense might be. The elements of murder in the second degree are (1) an unlawful killing and (2) malice, which may be satisfied by evidence of any of the three prongs of malice. See *Commonwealth v. Earle*, 458 Mass. 341, 346 (2010), citing Model Jury Instructions on Homicide 20 (1999). Some legal guidance is especially necessary in the case of an offense such as murder, and doubly necessary when the charge of murder depends on a theory of culpability such as felony murder that is a purely legal construct that no lay grand juror will comprehend without some guidance. There was no evidence that the defendant in this case intended to kill, and the evidence presented to the grand jury presented a live issue as to whether malice could be found---even against the reduced standard of probable cause. The Constitution and Declaration of Rights require that a grand jury, not a reviewing court, make that decision.

2. The harms caused by the insufficiency of the evidence before the grand jury and by the legal impact of the absence of instructions that would have equipped the grand jury to perform its constitutional role will not be resolved by the outcome of a later trial before a petit jury. In this case very substantial harm falls on the defendant by reason of the indictment itself, irrespecting the outcome of any later trial. An important aspect of this harm is the crippling effect of the risk of a looming mandatory minimum sentence consequent to the murder indictment. As the United States Supreme Court has recently noted, in recognizing that plea bargaining is a critical stage of the contemporary criminal process:

The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," Lafler, post, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system." Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992). See also Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes.

Missouri v. Frye, \_\_\_ U.S. \_\_\_, 132 S.Ct. 1399, 1407 (2012).

In *Commonwealth v. Walczak*, \_\_\_ Mass. \_\_\_, (SJC No. 11155, Dec. 12, 2012)

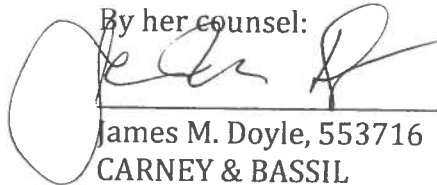
three justices of the SJC would have held that when a prosecutor seeks a murder indictment before a grand jury in a case where there is substantial evidence of mitigation, the grand jurors must be instructed on the role that mitigation plays in any assessment of the nature of the homicide offense. (Opinion of Gants, J., in which Botsford and Duffly, JJ., joined). This case, which required no instruction as to mitigation, but simply an recital of the elements of the offense presents a simpler issue from that perspective. A third justice (necessary to the creation of a plurality) did not reach that general question, but held that instructions were required in a case where the decision facing the grand jurors implicated a choice between juvenile court and Superior Court adjudication and sentencing. (Opinion of Lenk, J.).

The defendant here contends that either rationale requires dismissal of the pending murder indictment. The transformation in the pretrial process created by the possibility of the imposition of a mandatory minimum life sentence after trial for murder and its impact on a vulnerable defendant with a horrific history of childhood sexual abuse, post-traumatic stress, cognitive disability and adult mental health diagnosis is not genuinely distinguishable from the transformation threatened by the juvenile/adult decision facing the grand jurors in Walczak.. The indictment returned by the grand jury here worked a qualitative change in the defendant's position, placing numerous features of the crime and the defendant that would ordinarily play a role in the effort to arrive at a proportionate individualized sentence out of reach in the event of a trial conviction. The felony murder rule---and only the felony murder---provides even a plausible rationale for this indictment, but the grand jurors were never told that, nor told what the felony murder rule requires.

Respectfully submitted,

MELISSA PFEIFFER,

By her counsel:



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James M. Doyle, 553716

CARNEY & BASSIL

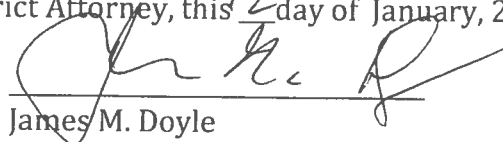
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CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Motion was served by mail on the office of Julie Higgins, Esq., Assistant District Attorney, this 12 day of January, 2013.



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James M. Doyle



## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

SUPERIOR COURT DEPARTMENT  
NO. SUCR-2011-10211

COMMONWEALTH

V.

MELISSA PFEIFFER

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
AMENDED MOTION TO DISMISS INDICTMENT

On the filing of the Commonwealth's Opposition to the Defendant's Motion to Dismiss, Judge Locke granted the defendant leave to file a Memorandum in reply.

The defendant, by counsel makes the following points:

1. *The evidence of "third prong" malice is insufficient.* In its Opposition the Commonwealth, for the first time, offers a theory of second degree murder justified on the basis of "third prong" malice to justify the indictment. This is plainly mistaken. "Third prong" malice requires that the defendant committed an intentional act which in the circumstances known to the defendant, a reasonable person would have understood created a plain and strong likelihood of death."

Commonwealth v. Erle, 458 Mass. 341, 346 (2010), citing Commonwealth v. Grey, 399 Mass. 469, 470, n.1 (1987). The circumstances that matter are the circumstances known *at the time of the act*. Although the Commonwealth recites a lengthy narrative of the horrific events of Christmas Eve, 2010, only the first

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elements of that narrative---the moment at which Ms. Pfeiffer allegedly applied a lighted paper to her boyfriend's clothes---is of any relevance. Whatever a reasonable person might have known or learned later in that sequence of events, at *that* moment of lighting the fire a reasonable person would not, and could not, have perceived a plain and strong likelihood of death. The argument that the act of burning the clothes was a criminally reckless one might be easy to accept, but that is not the argument that the Commonwealth is now making., and it is an argument for manslaughter, not murder.

2. *The evidence of arson-based felony murder is insufficient.* The Commonwealth fails to recognize that arson requires willfulness. Willfulness here requires the intent not simply to vandalize clothing by fire, but to set a fire *with the object* of burning a building. It does not matter that whether or not there was "an evil intent". The "willfulness" requirement means that accidentally or negligently caused burnings are not arson; to act willfully, a person intends both her conduct and the resulting harm.<sup>1</sup> The crime of arson requires not simply the intent to burn personal property, but the intent to burn a *dwelling* at the time of the act. The cases cited by the Commonwealth indicating that there was sufficient evidence of the identify of who set the fire have no bearing on the issues raised in this case, where

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<sup>1</sup> The Commonwealth's repeated citations to Commonwealth v. Van Tran, 463 Mass.8 (2012) to contrary effect are rendered crudely misleading by the omission of any reference to the fact that the SJC's holding depended on the trial judge's supplemental instruction that "Willfulness means that the defendant intended [the] resulting harm, which in this case is burning a dwelling house. *It means to set a dwelling house on fire, not to light a fire in general.*" Id., 463 Mass. At 26, n1. (emphasis added.)

all of the evidence before the grand jury indicated that the defendant's purpose was to set fire to the personal property of her boyfriend as she had done before.

3. *The logic of Commonwealth v. Walczak is directly applicable to this case.*

In Commonwealth v. Walczak, 463 Mass. 808 (2012), the Justices of the Supreme Judicial Court agreed unanimously that the evidence before the grand jury was sufficient to show murder in the second degree.

The court affirmed the dismissal of the indictment nevertheless. The due process question, according to a plurality of the justices was not whether the decision that the evidence of probable cause was sufficient; the due process question was who made the decision. The Supreme Judicial Court held that due process required that the probable cause decision must be made by an independent grand jury.

Four justices agreed that under some circumstances due process of law requires that the grand jury considering a murder indictment must be instructed on the elements of the crime of murder and any defenses or mitigating circumstances that are raised by the evidence." *Id.*, at 833 (Concurring Opinion of Lenk, J.). Three Justices would require instructions on the elements of the offense in any "appropriate instance" where the evidence of a legal defense or mitigating circumstances is so strong that if such evidence were withheld the integrity of the grand jury would be impaired. *Id.*, at 842 (Concurring Opinion of Gants, J., in which Botsford and Duffly, JJ., joined). One Justice (Lenk, J.) limited her holding to the circumstances presented directly in Walczak: a situation in which the difference

between a second degree murder and a manslaughter indictment worked a qualitative change on the circumstances of a juvenile defendant.

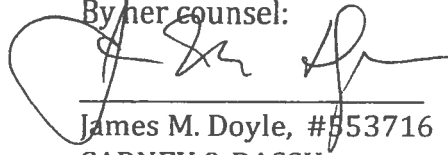
The logic of all of the opinions of the justices constituting the plurality indicates that the defendant's case, where the difference between a second degree murder indictment that creates the risk of a mandatory life sentence, and a manslaughter indictment is a qualitative one: one decision permitting an individualized sentencing and one forbidding it, is one in which the integrity of the grand jury was impaired by the Commonwealth's determination to refuse the defense request to instruct the grand jurors on the elements of the offense.

The grand jurors here were left without legal guidance necessary for the performance of their constitutional role. They were left, in effect, to employ a tort theory of liability rather than the elements of the crime of murder.

Respectfully submitted:

Melissa Pfeiffer,

By her counsel:



James M. Doyle, #553716

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617 686 0275

CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Reply Memorandum was served by hand on the office of Julie Higgins, Esq., Assistant District Attorney on the 2 the day of March, 2013.



James M. Doyle

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT  
SUCR2011-10211

COMMONWEALTH

vs.

MELISSA PFEIFFER

**MEMORANDUM OF DECISION AND ORDER**  
**ON DEFENDANT'S MOTION TO DISMISS**

The defendant, Melissa Pfeiffer ("Pfeiffer") was indicted by a Suffolk County grand jury on charges of second degree murder, arson, assault and battery by means of a dangerous weapon, and two counts of causing injury to a firefighter. By an Amended Motion to Dismiss<sup>1</sup>, Pfeiffer seeks dismissal of the charge of murder in the second degree, contending that the indictment is predicated solely on a theory of felony murder, the underlying felony being the arson of a dwelling house.

The defendant contends that the evidence presented to the grand jury, viewed favorably to the Commonwealth, supported at most a finding that the defendant willfully burned her boyfriend's clothing, but was insufficient to support a finding that she willfully and maliciously set fire to the dwelling. The defendant also argues that the murder indictment must be dismissed because the prosecutor impaired the integrity of the proceedings by giving a limiting instruction

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<sup>1</sup> The amended motion is not docketed on the clerk's minutes, although the certificate of service indicates that it was served on the Commonwealth in January, 2013, replacing an earlier motion to dismiss that was filed on May 1, 2012 (Pleading # 30). The Commonwealth filed an opposition to the amended motion on February 14, 2013, to which the defendant filed a reply memorandum (also not docketed). The matter was heard on March 12, 2013, and taken under advisement.

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regarding portions of the testimony of William Brewer, and based on the commonwealth's failure to give recorded legal instructions regarding the elements of the crime of arson.

### FACTS

For purposes of the instant motion, the following facts could have been found through the grand jury presentation. The defendant resided with her boyfriend, William Brewer, in an apartment at 295 Spruce Street in Chelsea. The building contained five apartments; two on the first floor and three on the second floor (accessed by two different doors on Spruce and Addison streets). The defendant and Brewer rented the rear first floor apartment. The defendant had a long history of trauma which became aggravated around the holidays. In the past, when arguments with Brewer occurred, the defendant became destructive toward Brewer's property. Several months before the instant fire, the defendant had set Brewer's clothes on fire during one such argument.

During the evening of December 24, 2010 (Christmas Eve), the defendant and Brewer argued sometime after 8:00 or 9:00 p.m. The defendant was upset because Brewer had earlier said that he intended to leave her in January because of her erratic behavior. The argument escalated when Pfeiffer ripped a Coach pocketbook that Brewer had and then began cutting her own clothing with a box cutter. Brewer decided to leave the apartment and went to a nearby bar for about 10 minutes. When he returned, the outer door was locked and the defendant refused to let him in. Brewer went to see a neighbor and, finding that the neighbor was not home, returned to 295 Spruce Street. As he approached, he saw Pfeiffer exit the building, locking the door behind her, and she told him, "your clothes are burning." Brewer looked toward the building and saw smoke coming from their first floor (living room) window. When he asked the defendant

why she had started a fire, Pfeiffer responded, "that's what you get."

Brewer, assisted by other bystanders, unsuccessfully attempted to gain entrance by kicking at the front door. The fire spread to other units within the building. One of the second floor tenants, Paul Pitts, was forced to leap out a second floor window. Pitts suffered burns over approximately seven percent of his body, requiring hospitalization at the Massachusetts General Hospital for severe injuries. Once the fire was extinguished, firefighters were able to enter the second floor and discovered the body of a 20 year old female named Crystal Lynn Blanchard. Following an autopsy the medical examiner determined that Blanchard died as the result of smoke inhalation and thermal injuries from the fire.

Witnesses saw Pfeiffer standing outside the building as the fire progressed. She seemed unemotional and undisturbed by the situation, telling one concerned bystander that she had set her boyfriend's clothes on fire because he deserved it. Following her arrest, Pfeiffer told her cellmate that after an argument with her boyfriend, she set a notebook on fire and threw it onto a pile of Brewer's clothes. When the fire grew out of control, Pfeiffer left the apartment, shutting the doors behind her.

## DISCUSSION

Ordinarily, "an indictment valid on its face should not be dismissed absent a showing that the defendant's ability to obtain a fair trial is prejudiced." Commonwealth v. Pellegrini, 414 Mass. 402, 405-406 (1993); Commonwealth v. Badgett, 38 Mass. App. Ct. 624, 625 (1995). Only in limited circumstances, as where the evidence presented to a grand jury is insufficient to support the existence of probable cause for an arrest and to establish the identity of the accused will the Court inquire into the validity of the indictment. Commonwealth v. McCarthy, 385

Mass. 160, 163 (1982). “Probable cause requires more than mere suspicion but something less than evidence sufficient to warrant a conviction.” Commonwealth v. Hason, 387 Mass. 169, 174 (1982); Commonwealth v. O’Dell, 392 Mass. 445, 451 (1984)(probable cause “considerably less exacting than a requirement of sufficient evidence to warrant a guilty finding.”). At a minimum, the grand jury must receive evidence supporting a finding of probable cause as to each of the elements of the charged crime(s). See Commonwealth v. Moran, 453 Mass. 880, 884 (2009).

From a thorough review of the grand jury minutes and the parties' legal submissions, the Court rules that the grand jury heard sufficient evidence to warrant issuance of an indictment for second degree murder. At a minimum, the evidence (and inferences reasonably drawn therefrom) showed that the defendant engaged in a course of conduct that a reasonable person, viewing the circumstances as known to the defendant, would have understood created a plain and strong likelihood of death, satisfying the so-called third prong of malice. See Commonwealth v. Earle, 458 Mass. 341, 346 (2010). Contrary to the defendant's suggestion in her Reply Memorandum, the defendant's culpable conduct included more than willfully setting fire to her boyfriend's clothing; she did so in an open room of a multi-unit apartment house late at night; she watched as the fire spread (and spread out of control), and then fled the building without alerting anyone else inside, locking the doors on the way out which prevented others from rescue attempts. The sequence of events and the circumstances surrounding the fire unquestionably presented a known risk that others inside the building could perish before firefighters were able to contain and extinguish the fire, and ventilate the building.

The defendant also seeks dismissal based on the claim that the facts presented to the grand jury cannot support a theory of second degree felony murder based on her conduct in



setting the fire. According to the defendant the evidence, including her statements regarding the fire, show at best that she intended to burn Brewer's clothing and therefore she did not willfully and maliciously set fire to a "*dwelling*" as required by G.L. c. 266, § 1. The statutory language for arson is that the defendant, "willfully and maliciously set fire to, burns, or causes to be burned . . . a dwelling house." *Id.* The state of mind required relates to the object of the fire, that is, that the defendant intended the burning of a dwelling and not some other item or object. Therefore, if the evidence showed that the defendant intended (and foresaw) no more than to destroy her boyfriend's personal property by fire, she would be culpable at most for burning personal property, a violation of G.L. c. 266, § 5. In contrast to the crime of arson, this would not serve as a predicate for second degree felony murder.

Determining a person's state of mind, like proof of arson in most cases, is often proved by circumstantial evidence and the inferences to be drawn from the evidence. Commonwealth v. Lugo, 63 Mass. App. Ct. 204, 206 (2005); Commonwealth v. Mazanotti, 26 Mass. App. Ct. 522, 525 (1988). "Malice in arson comprises only three components . . . [T]he willful doing of an unlawful act without excuse is ordinarily sufficient to support the allegation that it was done maliciously and with criminal intent." Commonwealth v. Van Tran, 463 Mass 8, 26 (2003); quoting Commonwealth v. McLaughlin, 431 Mass. 506, 513 n.6 (2000). Willful conduct is intentional rather than accidental or negligent conduct. Commonwealth v. Armand, 411 Mass. 167, 170 (1991).

In Commonwealth v. Van Tran, 463 Mass 8 (2003), the defendant was convicted of arson where the evidence showed that he brought a can of gasoline into his estranged wife's apartment, poured gasoline around himself, splashing it on his wife and infant child, and lighting a match.

On appeal the defendant argued that the arson conviction could not stand because the evidence could only support a finding that the defendant intended to burn himself and that the burning of the apartment was accidental. Reviewing the evidence, the court disagreed, stating,

A reasonable jury could infer from this evidence that the defendant was aware that by igniting the gasoline he would light not only himself on fire, but other people and things. Further, by his failure to take action to put out the fire, or to sound an alarm, the jury reasonably could have inferred that the defendant intended that the fire burn the apartment.

Id. at 27-28.

In the instant case the grand jury heard evidence of the defendant's conduct that is elementally indistinguishable from the circumstances presented in Van Tran. The evidence could support a finding that angered by her boyfriend, Pfeiffer intentionally lit a combustible paper product which she dropped onto a pile of clothing in the center of the apartment and, seeing the fire erupt, fled the apartment and stood stoically in front of the building. Her failure to alert other occupants, to call the fire department, or take other steps to extinguish the open flame, could reasonably support a finding (at least at the probable cause stage) that she willfully burned or caused to be burned, portions of the structure. Thus, there is no basis for dismissal of the murder indictment under *McCarthy* principles.

The defendant next argues that the indictment should be dismissed because the Commonwealth failed to provide the grand jury with recorded legal instructions consistent with the *Superior Court Model Jury Instructions* on the crime of arson.<sup>2</sup> This omission impaired the integrity of the proceedings, says the defendant, and deprived her of Due Process because she

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<sup>2</sup> The defendant apparently made written requests to the prosecutor prior to the conclusion of the grand jury proceedings that recorded instructions regarding the elements of felony murder and arson be given to the grand jury prior to their deliberation.

faces a murder rather than a manslaughter indictment.

The contention fails for two principal reasons. First, as discussed above, the grand jury heard sufficient evidence to establish probable cause on the murder and arson indictments. Second, there is no right to challenge the Commonwealth's failure to provide specific instructions of law as to the elements of the charged offenses under the circumstances of this case. The defendant relies on the recent SJC decision in Commonwealth v. Walczak, 463 Mass. 808 (2012), for the proposition that due process considerations require instructions where the evidence of a legal defense or mitigating circumstances is so strong that failure to provide instructions would impair the integrity of the grand jury. See Commonwealth v. Walczak, 463 Mass. at 842 (concurring op. of Gants, J.).

The *Walczak* decision has no application to the instant case. Its holding is set forth in a one-paragraph *per curiam* opinion, requiring recorded legal instructions only when the grand jury is considering a murder indictment against a juvenile and where there is substantial evidence of mitigating circumstances. Although the decision has thoughtful and comprehensive concurring opinions by several justices of the Supreme Judicial Court, the holding of the court's majority is limited. Because the defendant here was over the age of 17 at the time of the alleged crime she is not entitled to the benefit of the *Walczak* decision.

The defendant's final challenge, claiming that the grand jury proceeding was impaired because the prosecutor provided a limiting instruction as to prior bad act evidence of William Brewer, does not warrant extended discussion. There was no error in the instruction, nor would its absence likely have changed the grand jury's decision to issue the instant indictment.

**ORDER**

The amended motion to dismiss is **DENIED**.

  
Justice of the Superior Court

Dated: May 23, 2013

73

SUFFOLK, ss:

SUPERIOR COURT DEPARTMENT  
NO. SUCR-2011-10211

COMMONWEALTH

V.

MELISSA PFEIFFER

MOTION FOR BILL OF PARTICULARS

Now comes the defendant, Melissa Pfeiffer, by counsel, and moves, pursuant to Mass. R. Crim. P. 13(b) for a bill of particulars as to each of the currently pending indictments.

As grounds for this motion, counsel states as follows, under the pains and penalties of perjury:

1. The defendant is charged by indictment with murder and associated offenses including injury to a firefighter.
2. At various times during the pendency of the case, the Commonwealth and/or its witnesses have maintained that Ms. Pfeiffer's liability is based on either her setting fire to her boyfriend's clothes, or of failing to act to warn or rescue others once a fire had started, or both.
3. The grand jury that returned the indictment was provided with no legal instructions regarding the basis of liability, and therefore it is impossible to discern from the existing record on what alleged act or failure to act of Ms. Pfeiffer's the theory of liability is premised.

FILED JUN 24 2015

FILED JUN 24 2015

10/13/15 Upon hearing, the Commonwealth will proceed on a theory of 2nd degree murder being the crime of arson, further particulars are not required. At trial it is intentionally setting fire to or within an occupied dwelling.

4. Similarly, it is not possible to tell what culpable mental state is alleged to have accompanied any guilty act alleged since: a) it is not possible to discern which is the relevant act, and, b) various mental states are apparently simultaneously alleged.

5. The indictment is therefore duplicitous. See, Commonwealth v. Ries, 337 Mass., 565 (1958), and it fails to give the defendant constitutionally adequate notice of the charges against her.

6. Massachusetts Rules of Criminal Procedure 13(b)(1) states in relevant part that “a defendant may request or the court upon its own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.”

7. “The use of a bill of particulars is to “set out in detail that which is included in the allegations of a complaint or indictment.” Commonwealth v. Hayes, 311 Mass. 21, 25 (1942). The defendant and this Court cannot reasonably rely on the indictment by itself or the Commonwealth’s oral representation as to what the defendant is accused of. The defendant’s right to know what she is being accused of is grounded in our Commonwealth’s Constitution. “No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him...” M.G.L.A. Const. Pt. 1, Art. 12. This Court has the discretion to order such information. “The extent to which the Commonwealth may be required to specify as to matters of details rests in the sound judicial discretion of the judge. All that is required is that the indictment, *read with the bill of particulars*, be sufficient fully, plainly, substantially and formally to give the defendant reasonable knowledge of the crime with which he is charged.” Hayes, 311 Mass. at 25-26 (emphasis added). Here, in the absence of a bill of

particulars the indictment absolutely does not fully, plainly, substantially or formally give the defendant any reasonable knowledge of the crime to which she is charged. Instead, the indictment alleges that the defendant committed murder but provides no notice of the act or mental state accompanying the act that forms the basis of the charge.

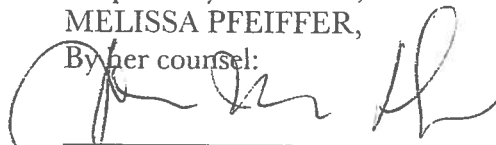
Commonwealth v. Dean, 109 Mass. 349 (1872).

8. A bill of particulars stating the specific act and specific culpable mental state accompanying the act with which the defendant stands charged is necessary to protect the rights to due process of law and effective assistance of counsel provided by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Article XII of the Massachusetts Declaration of Rights.

WHEREFORE, the defendant respectfully moves that this Motion be granted, and the Commonwealth ordered to file a bill of particulars within ten (10) days.

Respectfully submitted,  
MELISSA PFEIFFER,

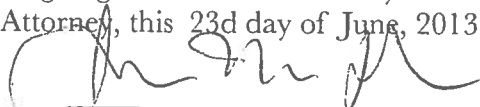
By her counsel:



James M. Doyle, 553716  
Bassil, Klovee & Budreau  
20 Park Plaza, No. 1005  
Boston, MA 02116  
617 686 027

#### CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Motion was served by mail on the office of Julie Higgins, Esq., Assistant District Attorney, this 23d day of June, 2013.



James M. Doyle

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS

SUPERIOR COURT TRIAL DEPT  
2011 SUCR 10211

COMMONWEALTH

V.

MELISSA PFEIFFER

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JOINT PRETRIAL MEMORANDUM

---

Now come the parties in the above-entitled matter and file the following Joint Pretrial Memorandum:

**STATEMENT OF FACTS*****Proposed by Commonwealth:***

During the evening hours of Christmas Eve 2010, the defendant intentionally set a fire inside her first floor apartment located at 295 Spruce Street in Chelsea. The residence of 295 Spruce Street is a five unit, two story apartment building. The fire engulfed the first and second floors. Twenty year old Crystal Blanchard died in the fire inside her second floor apartment. Ms. Blanchard's boyfriend, Paul Pitts, jumped out a second floor window to escape the fire and as a result suffered serious bodily injury.

Two firefighters sustained injury as they worked to suppress the fire.

The defendant denies these allegations.

***Proposed by Defendant:***

During the evening hours of Christmas Eve 2010, a fire began inside the first floor apartment shared by the defendant and William Brewer, and located at 295 Spruce Street in Chelsea. The residence of 295 Spruce Street was a five unit, two story apartment building at the time. The fire engulfed the first and



second floors. Twenty year old Crystal Blanchard died in the fire inside her second floor apartment. Ms. Blanchard's boyfriend, Paul Pitts, jumped out a second floor window to escape the fire and as a result suffered serious bodily injury.

Two firefighters sustained injury as they worked to suppress the fire.

The Commonwealth alleges that the defendant intentionally set fire to the dwelling. The defendant denies these allegations.

### **PROPOSED STIPULATIONS OF THE PARTIES**

#### **None at this time**

#### **Prospective Witnesses**

For the Commonwealth:

Please refer to the Witness List provided separately by the Commonwealth.

For the Defendant:

1. Christopher Wood *of Tewksbury*
2. Frank DiCataldo *of Norwood*
3. Marcia Brewer
4. Sarah Alcorn *of JP*

#### **Proposed Exhibits**

For the Commonwealth:

- Various video footage and photographs from inside and outside 295 Spruce Street, Cheslea
- Maps and Diagrams of area
- Statements by the defendant (including audio recording and transcript)
- Jail Calls

- Medical records
- Death certificate

For the Defendant:

Medical records

DSS records

Certified copies of convictions

### **Proposed Pretrial or trial Motions**

For the Commonwealth:

- Request to run criminal checks of all potential jurors
- Proposed Voir Dire questions for jurors and request for attorney conducted voir dire
- Family photograph of victim, Crystal Blanchard
- View
- Commonwealth respectfully reserved right to file additional motions based on filings by defense and additional issues that may arise

For the Defendant:

- *In limine* motions regarding segments of certain transcribed materials, offered by Commonwealth including police interrogation of defendant; telephone call recordings, Death Certificate, etc.
- Derivative use of statement of defendant obtained by unconstitutional interrogation, including, e.g., testimony of Monique Paul, references by William Brewer, et al.
- *In limine* motion regarding “Learned Treatise” status of National Fire Protective Association 921.
- *In limine* motion to exclude, based on Daubert-Lanigan status of Commonwealth’s proposed expert testimony regarding source of fire.
- *In limine* motion regarding William Brewer’s criminal history relevant to impeachment, status a potential third-party perpetrator,

source of bias in Brewer's conduct, and inadequacy of police investigation.

- Proposed voir dire questions.
- Defendant respectfully reserves right to file additional motions based on filings by Commonwealth and additional issues that may arise

**Defendant's Custody status**

The defendant is in custody.


**Whether the Defendant requires interpreter services**

The defendant does not require an interpreter.

**Estimated Length of trial**

Two weeks

Respectfully submitted by Both Parties

By:   
Julie Sunkle Higgins  
Assistant District Attorney  
One Bulfinch Place  
Boston, MA 02114  
617-619-4214

By: \_\_\_\_\_  
Attorney James Doyle  
Bassil, Klovee & Budreau  
20 Park Plaza  
Boston, MA 02116  
617-366-2200

Date: January 14, 2016

**INTERVIEW OF MELISSA PFEIFFER**

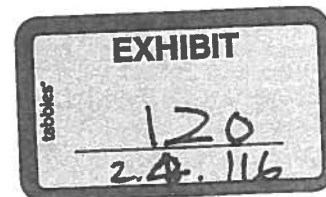
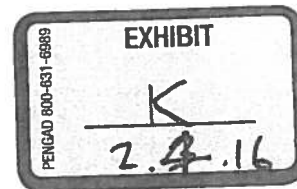
January 6, 2011

PRESENT:

Melissa Pfeiffer

Trooper Kevin Sweeney

Sergeant Ed Conley



**Sergeant Ed Conley:** OK, let's see if I can figure out this thing here.

**Trooper Kevin Sweeney:** OK.

**Sgt:** OK, we're on the record.

**Trooper:** OK, it's um, Wednesday?

**Sgt:** Thursday.

**Trooper:** Thursday, December 6<sup>th</sup>, 2011.

**Melissa Pfeiffer:** January.

**Trooper:** OK, it's, uh, Thursday, January 6<sup>th</sup>, 2011. It's, um, approximately 3:56 p.m. Trooper Kevin Sweeney assigned to Suffolk County D.A.'s Office.

**Sgt:** Sgt. Ed Conley, Chelsea Police Department.

**Melissa Pfeiffer:** Meli...

**Trooper:** Could you say your first and last name, spell your last name.

**Melissa Pfeiffer:** Melissa Pfeiffer, P-F-E-I-F-F-E-R.

**Trooper:** And your date of birth?

**Melissa Pfeiffer:** Uh, January 12<sup>th</sup>, 1984.

**Trooper:** January 12<sup>th</sup>, '84.

**Melissa Pfeiffer:** Um-hm.

**By Trooper Sweeney:**

Q: What's your, where are you currently staying?

A: Right now, I'm at the, uh, Colonial Traveler Inn in Saugus.

Q: And that's Route 1 you said?

A: Yes.

Q: OK. Are you aware that we're recording this conversation?

A: Yes.

Q: OK. Um, before we get started, I just want to, uh, advise you your rights per Miranda using a Chelsea Police Department form.

A: Uhm.

Q: Uh, before I ask you any questions, my duty as a state police trooper to advise you of your rights per Miranda. You have the right to remain silent. If you choose to speak, anything you say can be used against you in a court of law or other legal proceeding. Do you understand that?

A: Um-hm.

Q: OK. You have the right to consult with a lawyer before answering questions, and you may also have your attorney present with you during any questioning. Do you understand that?

A: Yes.

Q: OK. If you cannot afford a lawyer, and you wish to have one, a lawyer will be provided for you by the Commonwealth without any cost to you. Do you understand that?

A: Um-hm.

Q: You may also waive your right to counsel and your right to remain silent, and you may answer questions, any, answer any questions t- or make any statements you wish. If you decide to answer any questions, you may stop

answering questions at any time to consult with your attorney. Do you understand that?

A: Um-hm.

Q: OK. Do you understand these rights that I've read to you?

A: Yes.

Q: OK. Having these rights in mind, do you wish to make a knowing, voluntary, and intelligent waiver of these rights and answer any questions or make any statements at this time?

A: (Inaudible) I'll answer any questions you guys have.

Q: OK, it's a yes or no.

A: Yes.

Q: Yes, OK. Um, are you able to read?

A: Yes.

Q: OK. How far did you go in school?

A: I went to twelfth grade.

Q: Twelfth grade. OK. What I'll have you do, just take a look at the form. Um, read it over. And then if you, uh, if you understand this, answer question five and answer question six again just by circling it. Here's a pen.

A: Um. Um.

Q: (Pointing.) Having these rights in mind, do you wish to speak with us?

A: Yes.

Q: OK. So, if that's, um, if you understand this section. What I'm going to have you do is just sign on this, on that line.

A: OK.

Q: And then if you can on the line, just down. The date is January 6<sup>th</sup>, 2011. And it's uh, 4 p.m. Do you have any questions for us?

A: (Shakes her head no.)

Q: OK. I see a piece of paper. Did you bring that piece of paper here?

A: Yes.

Q: OK. And what is that a picture of?

A: That is a picture of the house where I used to live.

Q: OK. OK. Where did you get that picture?

A: I went to, um, City Hall.

Q: OK. And how come you brought that picture?

A: Well...I got it for the landlord's information on the back, and this picture was just happened to be on it. And it would be easier to sh...with the house, to explain stuff.

Q: OK. So you, you, you knew you were going to be talking with us?

A: Yes.

Q: OK. So you, um. This is just a picture of 61 Addison Street in front of the Town (?)...

A: Two nine...

Q:(?) Car.

A: 295. And the 61's on the side.

Q: OK. Alright.

A: 61 and that's 295.

Q: OK. So 295 is the side that's sh, sh...

A: Showing, um-hm.

Q: Shown with the burn marks on the first and second floor?

A: Um-hm.

Q: OK. What I'd, what I'd like to do, I'd like to just bring you back to December 24<sup>th</sup>, it's Christmas Eve. I'd like to talk to you about what was goin' on. You know, pretty much everything that you did that day, leading up to the fire. Umm, once we get to that point, you know, then we'll discuss the fire step-by-step, so we have an understanding of where it was and what was goin' on. Alright?

A: Um-hm.

Q: Alright. So, it's Christmas Eve. You, uh, you live at 295 Spruce at the point, right?

A: Um-hm.

Q: What apartment are you in?

A: Um, 1-R.

Q: 1-R?

A: It's the first right when you walk in the, when you walk in that door, when you walk in that door, it's the first door on the right.

Q: OK. And in that apartment, who lives with you?

A: It was me, my son Dahvon, and his father.

Q: How old is Dahvon?

A: He'll be two-and-a-half next week.

Q: How do you spell his name?

A: D-A-H-V-O-N.

Q: And he'll be how old?

A: Two-and-a-half next week.

Q: OK, and who's his father?

A: William Brewer.



Q: OK, anybody else living in that apartment?

A: No, it's just the three of us.

Q: OK, umm, alright. So, the three of yuhs are, are in that apartment.

A: Um-hm.

Q: Tell me what you're doin' Christmas Eve.

A: Dahvon was just playin'...

Q: OK.

A: During the day, whatever. I took him to Marsha's at like around like 3-3:15.

Q: OK, who's Marsha?

A: Will's sister.

Q: OK.

A: I took him over there to spend the night, so he...

Q: Just, you've gotta be as specific as possible.

A: I brought Dahvon over to Marsha, Will's sister's, to spen...to spend the night because...

Q: Where is Will's sister's house?

A: In Roxbury.

Q: Roxbury, OK. What's the address there?

A: Um, 133 Blue Hill Ave.

Q: OK.

A: I brought, because every time I bring him over there, he'd cry, he'd whine, he wouldn't go to them. He'd always want to stay with me, but, he's got used to them now, so now he runs up to 'em and gives 'em hugs and stuff, so. He was spending the night with them.

Q: OK, and how come he was spending the night with them?

A: Just so he got used to 'em. He, he wouldn't be scared of 'em. He wouldn't cry every time he went around 'em.

Q: OK, uh, and he was staying over there for Christmas Eve?

A: Christmas Eve, and I picked him up, uh Christmas night.

Q: You picked him up Christmas night?

A: Yeah.

Q: OK.

A: Around 7 o'clock I got there.

Q: OK.

A: Little after seven.

Q: OK. So, about 3 o'clock you said you left?

A: Yeah. 3-3:15.

Q: OK. How do you get over to Blue Hill Ave.?

A: I took the 111 to Haymarket. I got on the train, got off at Downtown Crossing. Got on the Silver Line, went to Dudley and got on, psss, I think the 15 or the 41. Got off at Blue Hill Ave. and walked up to her house from there.

Q: OK. Um, do you normally take that trek alone, or does Will go with you?

A: Nah, I usually go alone. Sometimes he'll go with me, but usually, I'll go by myself.

Q: OK. So, you, you bring Dahvon over to that, over to Blue Hill Ave. to Marsha's house.

A: Um-hm.

Q: Umm, what time do you get to Marsha's house?

A: Quarter to five, four-thirty, quarter to five, a little later. Somewhere in that timeframe.

Q: When you get there, what do you do?

A: I rang the doorbell, somebody, one of the kids comes down and answers. I bring him on upstairs. I stayed for awhile. I, I, she brought me to Haymarket. I make it around 8:30 or something. I went on the 111. I got back to Chelsea by about 9. It was a long day, I was tired, I was getting ready for bed. Will had asked me if I had gotten any money from, uh, his brother-in-law or his sister. I said no. He was like, alright, well then I'm gonna go to the bar. This is, a little after nine o'clock. 9:10-9:15. Um, he goes to the bar, and he get. I hear him talkin' outside right around...

Q: OK, let's just...

A: ...ten o'clock.

Q: Let's slow back down, alright? So you get there 4:30-4:45?

A: Um-hm.

Q: Who do you, who's at the house at that point?

A: Uh, Marsha, um, her two grandkids, her step-son.

Q: How old are the grandkids?

A: Fifteen and thirteen.

Q: Grandkids, fifteen years old. Do you know their names?

A: Um, Equa.

Q: How do you spell that?

A: Um, E-Q-U-A.

Q: OK.

A: Yeah, she's fifteen.

Q: OK, fifteen year old female.

A: Yeah.

Q: And then, who's the other one?

A: Mikey, he is, I believe he's thirteen, he got, I think he's gonna be fourteen in March, I'm not really sure.

Q: OK, so Mikey, Equa, Marsha, who else?

A: Oh, and then Tooley, her step-son.

Q: Tooley, how old is Tooley?

A: I think he's gonna be fif--, I think he just turned fifteen in December.

Q: OK.

Trooper: Sorry about that.

Sergeant: Do you need any water or anything?

Melissa Pfeiffer: No.

Sergeant: Sure?

Melissa Pfeiffer: No, I'm all set. Thank you.

Sergeant: OK.

**By Trooper Sweeney:**

Q: OK, we're just going to continue back. Again, you...we're still recording you. You understand that, right?

A: Yes.

Q: Um, alright. So, you get over to, umm, 133 Blue Hill Ave. S...somewhere between 4:30-4:45.

A: Yeah.

Q: OK. Um, at the house is Marsha, who is Will's...

A: Sister.

Q: Sister.

A: Um-hm.

Q: Umm. Her two grandkids, Equa and Mikey are there, and then it's her son, her step-son.

A: Step-son Tooley.

Q: Step-son Tooley. Anybody else?

A: Um, her two cats.

Q: OK. But people? No?

A: No.

Q: No other adults? Anything like that?

A: Her husband came in later on after.

Q: What's her husband's name?

A: Rudy.

Q: Rudy. Do you know what Marsha's last name is?

A: Um, it's either Brewer or Goodwyn. 'Cuz she's married, so.

Q: Brewer, Goodwyn. And Rudy, his last name is Goodwyn?

A: Yes.

Q: OK.

A: That's D-W, G-O-O-D-W-Y-N.

Q: Y-N?

A: Uh-hm.

Q: OK. OK. Um, you're at the house, d--, when you bring over, um, Dahvon, did you bring something over there to the house?

A: I brought his stroller over.

Q: OK.

A: I didn't bring. And I had a little bag with some, uh, some pajamas, some diapers, and a pair of clothes for the next day.

Q: OK, so that's all you brought over to the house?

A: Um-hm.

Q: OK. So you're over at the house until... What time to you leave there?

A: She drives me to Haymarket for 8:30 or something.

Q: Haymarket at 8:30?

A: Yeah.

Q: OK, so between...

A: Oh no, excuse me, excuse me. I got off, she dropped me off at the Mass. Ave., um, Silver Line stop, and the Silver Line took me to, um, South Station. I got on the Red Line at South Station.

Q: So you're over her house for about four hours?

A: Yeah.

Q: What do you do in the four hours that you're there?

A: I just, I'm just hangin' out.

Q: OK. Anything in particular?

A: No.

Q: OK. Did you go out from there, or did you stay inside the house?

A: I was, I was in the house.

Q: OK.

A: I was just lettin' Dahvon get used to them. I was still there while he's just gettin' used to them. So.

Q: OK. So you leave. You, do you take the bus line all the way back to Chelsea? Bus and train combination back to Chelsea?

A: Um-hm.

Q: Um, where do you, where do you get off the train in Chelsea?

A: Um...

Q: Off the bus.

A: I got off the bus at um, Spruce Street.

Q: OK. Where do you go from there?

A: Then I walk down the street back to this house. He's still there. Then I go in.

Q: Who's in the house?

A: Will.

Q: Will. Anybody else?

A: No

Q: What's Will doin'?

A: He wa--, he was using the bathroom. He's like, did you get any money? He, he's like, is that you? I was like, yeah. He's like, did you get any money? I told him, I said, no. He's like, alright, well I'm gonna go to the bar and see what I can get rid of. The bar is...

Q: OK, so, so he's in the bathroom in the apartment.

A: Um-hm.

Q: He asks, is that you comin' into the apartment?

A: Yeah.

Q: OK.

A: And then I say...

Q: He asked you about money. What, what was the money from? Who would have been giving you money?

A: Um, either his sister or her husband Rudy.

Q: Why would they be giving you money?

A: Um, I borrow money and pay it back to them, so.

Q: OK, did he send you over there with Dahvon to get money from them?

A: No, 'cuz he had sent me over, oh yeah, he sent me over with a, um, a Louis Vuitton bag for her. He had talked to her, and I guess he told her that he wanted twenty dollars for the bag, but I didn't know about it. So.

Q: So, that was an additional thing that you brought over?

A: Yes, yes, that's what else I had. Ah.

Q: OK.

A: And he had talked to her separately. That, uh, I, they had made that arrangement. I wasn't aware of it, so.

Q: OK, so he wanted twenty dollars for a Louis Vuitton bag.

A: Yes.

Q: OK. When you gave her the bag, what did she say?

A: She liked it. She's like, oo, this is nice, I like it.

Q: But, she didn't give you any money?

A: I didn't know that he...he's like, just give it to her. That's what he told me before I left, so that's what I did. I didn't know anything about money for the bag until I got home. When he's, when he's like, she didn't give you twenty dollars for the bag? I was like, no.

Q: Then what was said?

A: He's like, alright, well I'm gonna go to the bar and see what I can get rid of.



Q: OK, what do you mean get rid of?

A: Like, he, um, he had like some t-shirts, and um. I, he had some like clothes he was going to sell. And, I'm not really sure what they were. They was in like Market Basket plastic bags, so.

Q: OK. Was he upset that you didn't have the twenty bucks?

A: He was mad, but he's like, alright, I'll go to the bar. I want some fresh air, anyway. So.

Q: OK. So, what's, what's the conversation like regarding the money? Obviously...

A: He, he was a little mad, but I was like, I didn't know anything about no money. (Inaudible.) Like, I already owe Rudy like forty dollars anyway. I don't want to borrow any more from him. I keep making the bill. 'Cuz it was hard enough to pay that forty dollars back. So.

Q: OK. What's the, tell me exactly word for word what's the conversation. He asks...

A: He asks if I had any money from, from his family. I was like, no.

Q: What's he say? Did you get any money for the bag or did you just get any money?

A: No, did I get any money, period.

Q: Period. OK, and...

A: And I say no.

Q: OK, and what's his tone of voice at this point?

A: Just like we're talkin' now. He wasn't mad or anything.

Q: Alright.

A: Then he's like, well, I've got some stuff. I'll go see if I can get rid of it at the bar. 'Cuz it was just gonna be me and him at the house that night. So we was just gonna do some drinkin' and like watch tv or whatever. Watch some, I think there was basketball games on. So, we was gonna just watch some tv and drink a little bit.

Q: OK. So, he says he's gonna go to the bar...

A: Yeah.

Q: ...to sell some shirts.

A: Yes.

Q: What's he leave the apartment with?

A: He had a couple of, uh, bags, Market Basket bags with clothes in it, but I'm really not sure what was in the bags.

Q: How many bags?

A: Like, two. I believe it was two, but I'm really not sure.

Q: What time did he leave the apartment?

A: About 9:15-9:20, maybe.

Q: So he leaves pretty quickly from the time you get back to the apartment...

A: Um-hm.

Q: ...to the time he leaves.

A: Um-hm.

Q: And how, how long would you say you were in the apartment with him?

A: No more than like ten or fifteen minutes.

Q: OK. So he leaves. You think he's goin' to, what, what bar?

A: Um, the one right next to the, um, pizza with the, like the little boardwalk in the middle. I'm not sure of the name of it.

Q: Chelsea Walk Pub? Would you recognize it if you heard it?

A: Yes. It's right next to, um. I think there's like a store right next to it. I, I, when I see it, I'd know, I just don't pay attention to the names, so.

Q: OK, ok. Umm. So he leaves, you think, with two Market Basket bags with...

A: Stuff in it.

Q: Stuff to sell.

A: Yes.

Q: And what do you think he's doin'? Is he goin' to sell the stuff?

A: Yes.

Q: And be out for the night? Or is he...?

A: No, I knew he was coming back. I just didn't know how long he was gonna be gone.

Q: OK.

A: 'Cuz I heard him. 'Cuz his friends had called around the corner. I, I don't know his name. I heard Will outside around like ten o'clock, maybe, and I, and I, and I was like, I yelled out the window. I was like, your friend around the corner had called. And he's like, alright, I'm goin' over there. Then he comes back like a few minutes later.

Q: What window, what window were you at? What window was this?

A: This one right here. The living room one.

Q: So you think Will comes back, correct, at ten o'clock from the, the bar?

A: Yeah.

Q: Does he have the bags with him?

A: No, he didn't have anything in his hand.

Q: OK. Nothing in his hand?

A: Nothing.

Q: OK, so he, he comes to the window. Does he knock on the window? How do you know he's outside?

A: I heard him talking to somebody, but I, but I couldn't really see a face, so.

Q: OK. So he's outside. How long do you think he was outside the building?

A: I don't know.

Q: (Coughs.) Excuse me. OK, so he's outside talking to somebody. What do you do?

A: I heard him, and I, I opened the window. I was like, your friend around the corner had called. He's like, OK, I'm gonna go, I'm gonna go over there. And then he does.

Q: Wh--, what's your phone number again? The phone number that that person had called?

A: That phone number was, uh, 857-869-3912.

Q: Is that in your name?

A: No, it was in his.

Q: That was in Will's name?

A: Yeah, it was a, it was a birthday present to me back in '05, when I turned 21.

Q: OK. So, his friend calls your cell phone. But you don't know the kid's name? Do you know what he looks like?

A: He's a Spanish kid.

Q: How old?

A: In his twenties. He, he's got two dogs.

Q: How tall is he?

A: Um, I don't know, like six feet.

Q: What's he look like?

A: He's like, not real, he's like, average. Like six feet average.

Q: Skinny, heavy set...

A: He's like...

Q: ...medium?

A: ...he's like skinny.

Q: Skinny?

A: Yeah.

Q: Where's he live?

A: I don't know.

Q: You don't know what street or? From your door, which direction? When Will walked away, which way did he go?

A: He'd go that way. He'd walk out that door and go that way.

Q: So, down Spruce Street?

A: Somewhere, yeah. I really don't know where he lives.

Q: OK. What kind of dogs does he have?

A: Um, pit bulls.

Q: When he called, what'd he say?

A: He's like, is Willie there? I was like, no.

Q: Did you know who it was?

A: I know his voice, but I just, I don't know his name. They call him, they call him, like, D or something.

Q: Does his name show up on your phone?

A: Just the, just the, just the name. The number, I mean.

Q: What's the number? Do you have your phone?

A: I got this one. The other one, no I don't have, I don't have his number.

Q: It's that, you don't have his number saved under D?

A: Um, in the other phone, but the other phone, I didn't, I just, I just, it was on top of the fridge, and I just got out, so I wasn't thinkin' at grabbin' the phone or anything.

Q: OK.

A: So.

Q: Alright, so, Will comes back, you hear him outside, you open the window and say, your friend called.

A: Um-hm. He's like, alright, I'm gonna go.

Q: What was he goin' to the friend's house for?

A: I don't know.

Q: No idea? So, you, you thought you were hangin' out with him, right?

A: Yeah. He, he. I know he said he was going to go to the liquor store, too, after, and get whatever, beer or something, to drink.

Q: OK. So, you tell him his friend, the kid you thinks name's D...

A: Yeah.

Q: ...has called. And...

A: He's like, alright, I'm goin' over there. I'll be back in a little while. OK.

Q: And then you, he leaves.

A: Um-hm.

Q: How, how long is he gone?

A: Five minutes. Ten minutes at the most.

Q: What happens to this guy that's outside talkin' to him?

A: He leaves after, after I tell Will, like, they split ways. And, and they both go their own separate way.

Q: OK. So, Will goes towards, down Spruce Street towards, what st--, cross street? Cruckey (?) crosses Addison Street?

**By Sergeant Conley:**

Q: Would you say he comes out...

A: No, he comes out that door, and he walks up that way.

Q: OK, so he's, he's goin' up more towards Lawrence Street?

A: Yeah.

Q: Up Spruce.

**By Trooper Sweeney:**

Q: Up Addison and then to?

**By Sergeant Conley:**

Q: No, it's the opposite direction. He's going...

A: He's goin' up.

**By Trooper Sweeney:**

Q: Out the door to the right?

**By Sergeant Conley:**

Q: ...Yeah, and he's banging a right out the door.

**By Trooper Sweeney:**

Q: OK, alright. OK, so he's heading up that way.

A: Yeah.

Q: The other guy goes which direction?

A: Uh, I guess the other keeps goin' down Spruce. Past Market to Salt or whatever.

Q: OK. Alright, um. He leaves. He's gone for five or ten minutes. When do you see him again?

A: As I'm comin' out the house. I'm like, the house is on fire. The house is on fire.

Q: OK. So you come out. You come out, do you come out the Spruce Street side, this door here?

A: Yeah, I come out that door right there.

Q: OK. So you come out. Where's Will?

A: There's like a little, like little past that fence. I'm like, the house is on fire. The house is on fire.

Q: OK.

A: And like...

Q: So you come out the door. And then, there's a fence to your right.

A: Um-hm.

Q: Is that where you're referring? Towards like the elderly housing?

A: Yeah. Yeah.

Q: OK. And how far away from the house is he?

A: Not very far.

Q: OK. What's he doin'? Is he comin' towards...

A: He's, he's comin' towards the house. I'm like, the house is on fire. The house is on fire. And like...

Q: And what, what's he say?

A: He's like, what do you mean? What do you mean? But when I had come out, I had closed that door. 'Cuz I was always taught in school when there was fire drill to close all the doors and windows. So that's what I did.



Q: You closed all the windows?

A: Yeah, and I closed that door, too.

Q: What windows did you close?

A: I had that one closed, and the other, that one was already closed.

Q: OK, so the one where the fire is all burnt out of, you closed that window?

A: After I told him that his friend had called.

Q: We--, oh, but, not, not after, y--, you just closed it before the fire?

A: Mm.

Q: Or did you close it before the fire or after the fire?

A: Before.

Q: OK.

A: Right after I told him that his friend had called.

**By Sergeant Conley:**

Q: So all your windows were closed...

**By Trooper Sweeney:**

Q: Before the fire.

**By Sergeant Conley:**

Q: ...before the fire. And where, where were you, after you closed that window after talking to Willie, where did you go?

A: To the bedroom. Which is, that's the door to the bedroom.

Q: OK, so you, you, so this is the bedroom over here, this s--, section here?

A: Mm-hm. That's the bedroom window. One of 'em. That's the bedroom door.

Q: What did you do? So this is after you see Willie, before you leave the house. What, what were you doing then? What was goin' on?

A: I was just, I was just putting on my pajamas, getting ready to get comfortable for the night, you know? Get out of my clothes. It was a long day. Put my feet up.

**By Trooper Sweeney:**

Q: OK. So you, are you...What room are you hanging out in?

A: I was in the bedroom, just, doin' whatever.

Q: OK.

A: Dilly-dallying around, just.

Q: Alright, what I'll have you do...What's the shape of the bedroom? So you have the door on the corner.

A: Mm-hm.

Q: That's kinda at an angle. Right?

A: Yeah.

Q: Then you have this side wall.

A: Mm-hm.

Q: And then there's that window there.

A: Yeah.

Q: So this is the window. What else is in the room? So this fits across the front. Is this back wall like square? Pretty straight?

A: Um-hm.

Q: The wall inside? So is that some of what the room looks like?

A: Mm-hm.

Q: OK. Where's the, there's a door here?

A: The one on the...

Q: Which is on the front corner? Right?

A: Mm-hm.

Q: I'll put door here. Where's the door into the kitchen? Where is that door? On, do it, show me on this.

A: That's the bedroom, so that's the door, that, that's the front door that we always used.

Q: OK.

A: That goes, and you go in to the right, and there's the kitchen.

Q: OK.

A: And there's the hall.

Q: So the kitchen area is here, right?

A: Mm-hm.

Q: So where's the door, if this is your bedroom, where's the door? Take this. Whereabouts is the door? OK, so that's the door?

A: Yeah.

Q: Alright, so just write door next to that. Where's the bed? In the room?

A: It's like, mm...

Q: Just draw, draw the bed.

A: OK.

Q: What size bed is it?

A: Uh, I believe it was a queen.

Q: OK. Is it up against the wall?

A: No I had it out, away from the wall because there was like, bed bugs livin' in the wall. So I had it not up against it, but close, but not on it.

Q: OK. So, typically a queen bed is longer than it is wide.

A: Mm-hm.

Q: OK. So, is the, the head, where you put your head is, is your head?

A: Near the wall, it's near the wall but not touching.

Q: OK. So, the bed kinda comes out this way?

A: Mm-hm.

Q: So the bed, not on the wall?

A: Yeah, close to it, though.

Q: So if you lied, the, your feet, you'd be lying that way? Your feet would be down the bottom, correct?

A: Mm-hm.

Q: What else was in that room?

A: There was two dressers that way, the bed. There was one that way, and one that way.

Q: Alright. Why don't you draw those, too please.

A: That's that way.

Q: Are you against the wall on, with the dressers?

A: Two of 'em wa--, was. Two dressers, right here. There was one in front of the window and uh, there was one over here.

Q: So you had four dressers in there?

A: Yes.

Q: OK. Put a D on all the dressers. And all these dressers, are they close to the wall, or are they out in the middle of the room like your bed?

A: They were all up against the wall.

Q: OK.

A: And that one was like underneath the window.

Q: OK.

A: And it had a TV on top of it.

Q: OK. What else is in the room? What else is in that bedroom? Anything blocking this front door?

A: There was a board on the door.

Q: Board?

A: Yeah, that was like. But though, it was on there when I had moved in. It was like two things, like a, looked like a tube, like a long piece of wood on it.

Q: Yep.

A: Like it was put on there before I had moved in.

Q: How does that door, does that or, door open in or push out?

A: You open it in.

Q: In towards the bedroom?

A: Um-hm.

Q: Was there anything blockin' that door?

A: No, I don't believe so.

Q: Just that board?

A: Yeah.

Q: That board, could you lift that board out?

A: I could.

Q: OK.

A: Yeah.

Q: Yeah. And have you ever opened that door?

A: Yes.

Q: OK, so that door does open?

A: Yes.

Q: OK. What else is in the bedroom?

A: That's all.

Q: Alright. So you have four dressers.

A: Mm-hm.

Q: You have the bed. There's a window here. There's a door there.

A: Mm-hm.

Q: Where are the heaters in that room?

A: There is one behind that dresser.

Q: Underneath that window?

A: Yes.

Q: How big is it, do you know?

A: Like, it goes along the, um wall, like um...

Q: How long do you think, is it? Four feet, six feet, eight feet?

A: From like, probably where that chair is to almost like where that door stopper is.

Q: OK. Do you have any estimate on how big it is?

A: (Shakes head no.)

Q: No idea. OK.

A: Uh-uh.

Q: Alright, so that's underneath the window?

A: Um-hm.

Q: Where is the other heaters?

A: That's the only one in there. Then we go in the living room.

Q: OK, we'll get to the living room in a second. So the heater's there, and then the window there.

A: Mm-hm.

Q: That's all that's in that room?

A: Mm-hm.

Q: Is that room cleaned, or is it messy? Or? The bedroom?

A: The bed, it was, wasn't like super clean, but it wasn't like super messy.

Q: OK. Was there a lot of personal items in there? Like clothes? Was there a lot of...

A: Yeah, there was clothes. There was my clothes, Dahvon's clothes. Some of Will's clothes.

Q: Where were, where were the, where were the clothes in the room? Were they in the dresser, or were they out and about?

A: All of the clean ones were put in the drawer, were all put away in the dresser. The dirty ones (inaudible). There was like a, a baby bassinet that had some like dirty clothes in it which was like right next to that dresser.

Q: OK, so there...

A: And it had...

Q: ...was like a bassinet here?

A: Yeah.

Q: OK.

A: And that had some, that had some clothes that needed to get washed in it.

Q: OK. Were there any clothes or anything on the floor near the heater?

A: No.

Q: No. OK. Was there, where, was like clothes stacked in a pile anywhere, or uh?

A: Just in the bassinet, there were a bunch of clothes that needed to get washed.

Q: OK. How about on the floors? Anything else?

A: No, I don't think so.

Q: OK. Alright. And the um, why don't you tell us about...So, you're in the bedroom...

A: Yeah.

Q: ...lying on the bed.

A: I was just, I was just like just walking around the room. Just, I was like bored, waiting for him to come back, so. I was just like walking back and forth in the room, trying to figure out what I was gonna wear to bed and everything.

Q: OK.

A: Goin' back and lookin' at the TV every now and then, 'cuz it was on. I forget what channel though. Probably NBATV or something.

Q: OK. So, I, sorry, just gettin' a little off track here. So, Will leaves somewhere around 10 o'clock you said, right?

A: Um-hm. He had to go to, to go meet his friend.

Q: OK. And then what do you...you said you went to bed, right?



A: I was, I was, I was gettin' ready for bed. Gettin', takin' off my clothes I had on that day. Gettin' some pajamas on. Just walkin' back and forth from the liv-- , from the bedroom to the living room, kitchen area.

Q: OK. How long does that take?

A: That was just, I was just doin' that for about ten or fifteen minutes. Then I just lied down, waitin' for him to come back.

Q: OK.

A: 'Cuz I, I wasn't sure how long he was gonna be gone. And when he got back, if I was sleepin', he could've just woke me up or whatever.

Q: OK. So, how, you, you go in the room. After about fifteen minutes, you lie down.

A: Yes.

Q: What do you do? Is the TV on?

A: Not in the room. In the living room it was. But not in the bedroom.

Q: OK. So what are you doin' in bed? Are you goin' to sleep for the night?

A: I'm just, I'm just lying down. 'Cuz my feet hurt and everything. And I just, and our couch was actually uncomfortable to sit on. So I was just lyin' in bed waitin' for him to come back.

Q: OK, and what are you wearing? Are you wearin'...

A: I, I had put on a t-shirt and pair of boxer shorts that I had.

Q: OK. And you're lying in bed?

A: Um-hm.

Q: What are you, are you plannin' on goin' to sleep or?

A: And I'm trying to like get comfortable to go to sleep, but I keep, like, the TV kept like distracting me from goin' to sleep, so.

Q: OK.

A: 'Cuz it was on in the living room, but I could s--, I had the bedroom door open, so I could still hear it.

Q: OK. So then what happens?

A: Then I finally get up and went out in the living room. And like a few minutes after that, I was like, after like, I was hearing like the smoke detectors go off. And I wasn't sure why. And then I went back in the room. I got dressed, and.

Q: Back in what room?

A: The bedroom.

Q: OK.

A: I threw w--, what I had, I had put on that day, I had thrown back on, 'cuz I had left it out. And I went outside. And like, right after I got outside, that living room window like, blew out. It just popped.

Q: OK. So explain to me. So, you're in, you're in bed for about, you're walkin' around the apartment for about fifteen minutes after Will leaves.

A: Mm-hm.

Q: Then you go to bed. How long are you in the bed for?

A: Three, maybe five minutes.

Q: OK. So he's gone for, he...So after Will leaves, we'll do with that...fifteen minutes, just walkin' around.

A: Yeah.

Q: Then, you lay down in the bed?

A: Yeah.

Q: But you, and you're in your pajamas?

A: Mm-hm.

Q: Uh and how long do you think you were there?

A: No more than five minutes.

Q: OK. Then what do you do?

A: Then I hear the smoke detectors. I go out in the livin' room, but I really don't see anything. So I'm just like, m--, maybe, I don't know what was goin' on. And then I, then I waved somethin' in front of it to stop it. And then I, it went off again. Then I went out in the livin' room, I could smell smoke. And then I went outside. And like, right after I got outside, like, in that window, we have like a red curtain, and there was like a little bit of it that wasn't up, and I got outside, and I see, and then I seen flames in the window just like, puh.

Q: OK, so. You, you hear the smoke detector, you get up. You're up at that point.

A: Uh-huh.

Q: Where's the smoke detector that you hear?

A: It's in the bedroom.

Q: Where in the bedroom?

A: Right near the bedroom door. Like, the one that goes...

Q: Yeah, it goes.

A: ...from the, it goes from the living room to the kitchen.

Q: So again, there's the door in between the two rooms.

A: Mm-hm.

Q: Where is the smoke detector?

A: There.

Q: Right in front of the door?

A: It's like above it.

Q: Above it. Is it on the ceiling?

A: Yeah.

Q: OK. So somewhere right in here...

A: Mm-hm.

Q: ...is your smoke.

A: Mm-hm.

Q: So that's goin' off.

A: I wave like a towel in front of it. It stopped, but then it goes off again.

Q: So you wave the towel enough that...

A: It stopped, but then it started goin' off again.

Q: Did you see smoke at all?

A: No. Not until I like go to the door, the front door, that door, to go outside, is when I, like the smoke just like hit me.

Q: OK, so. You hear the smoke detector, you wave a towel in front of it.

A: Mm-hm.

Q: The alarm goes off. And then it starts back up. What do you do at that point?

A: The second time, I'm like, let me get, s--, something's goin' on. Let me get dressed and get out.

Q: OK, so...

A: So I threw on my clothes, my hoodie, I didn't even have a jacket on. And I go outside, and out that window there's like a...

Q: What door did you leave the building out of?

A: That one.

Q: OK. So...

**By Sergeant Conley:**

Q: Where were your, where were your clothes and hoodie? You said you got dressed. Where were, where were those things, items?

A: In the bedroom.

Q: OK.

**By Trooper Sweeney:**

Q: Whereabouts in the bedroom? Do you remember?

A: I threw `em on top of, um, the dresser.

Q: OK, which dresser? You said you had four of them. Whereabouts were your clothes?

A: They were on...

Q: This is the door on the corner.

A: Th--, they was on that dresser.

Q: OK, so your clothes were right where I'm puttin' the X?

A: Mm-hm.

Q: OK. Um, you put your clothes on. How long does that take ya?

A: A minute.

Q: OK. Then you go, and you're gonna head out this side door?

A: Mm-hm.

Q: You walk. Is the smoke alarm goin' off at this point?

A: (Nods yes.)

Q: OK. When you walk through the kitchen-living room area, what do you see?

A: Nothin' but smoke.

Q: Nothing but smoke?

A: Nothin' but smoke.

Q: OK. Any flames?

A: No.

Q: No flames whatsoever?

A: Um-um.

Q: Where did it look like the smoke was comin' from?

A: Like it's, there was, he had like a corner where like a bunch of stuff. So I don't know if it was, like, if he had a piece of clothing up against the heater, and it got too hot. But it was over in the corner where the heater that didn't work was. In that area.

Q: OK. So, this, you see, where's the smoke? Is it high up, or is it on the ground?

A: It was like slow. It wasn't high yet. But then, once I get to the, to this door, is when it really starts comin' up.

Q: Fire or smoke?

A: Smoke.

Q: OK. So, y--, you hear the smoke alarm. You wave a towel. Smoke alarms goes back off a second time. You go in the bedroom and change.

A: Um-hm.

Q: Um, how bad is the smoke at that point?

A: It was gettin' real bad.

Q: OK. Was it gettin' real bad in the bedroom?

A: No. On the way out.

Q: OK. So, you walk back through. You see smoke coming from the corner by, you said a heater.

A: Mm-hm.

Q: OK. No flames?

A: No.

Q: So, where, when you head out of the building, where, where is the first time you see flames?

A: Th--, I was standin' on the sidewalk. And there was like a red curtain, but there was like a little bit that wasn't put up. And I seen flames out there. And then, uh, then that window just we--, went flyin' everywhere.

Q: How long did that take to pop, that window?

A: Two to three seconds.

Q: OK.

A: It was real fast.

Q: When you saw that s--, when you're headin' out of your apartment, do you knock on any of the other doors? For the other tenants, or?

A: 'Cuz, 'cuz I don't, I didn't hear anybody in the apartment next door. And the people that lived upstairs, like, they go out at night, or whatever, so, I didn't even know if they were home or not, so. I didn't go upstairs or anything, or, I didn't hear anybody next door.

Q: OK. So you didn't, you just, you left the building and just waited. Did you, how come you didn't grab your cell phone on the way out?

A: I was just tryin' to get out. 'Cuz the smoke was gettin' real bad. I was just tryin' to get out myself. I wasn't even thinkin' about grabbin' the phone or anything.

Q: OK. Um.

A: The phone was the last thing on my mind that night.

Q: OK. Um, how come you changed up? Why'd you change your clothes?

A: 'Cuz I had on a pair of boxer shorts, and there was snow on the ground. And I didn't have any shoes or anything on, either, so.

Q: OK. Any reason why you didn't go out this front door?

A: 'Cuz it had, it had a board on it and stuff, and I just. I personally don't really use that door, so. I'm used to usin' the front, I'm used to usin' that one, so.

Q: So that's the door you used?

A: Yeah.

Q: OK. Did you, um...That area that you saw the fire, what was, what was over in that corner?

A: There was clothes. I know there was, uh, like an old, um, DVD, um, VCR combo.

Q: OK, so.

A: It didn't work. Um.

Q: So in that corner, you see a DVD...

A: Combo.

Q: ...VCR combo.

A: Um-hm.

Q: OK. What else?

A: And there was clothes.

Q: Wh--, what were the clothes?

A: It was Will's clothes. He had like uh, uh, he had some that needed to get washed that he. On the outside, but he had a bag of his stuff that he, he walked inside of a, a bag in that corner.

Q: What type of bag?

A: Like a, a bag with like wheels that like zip up, that you can roll.

Q: Like luggage? How big is it?

A: It was like, that high, maybe.

Q: Off the ground?



A: Mm-hm.

Q: OK. How wide is it?

A: That wide maybe. But he got, he got stuff in it. I really don't know how wide it was.

Q: OK. What type of material was that bag, do you know?

A: No, I don't.

Q: What color was it?

A: Black.

Q: Alright, so there's a black bag that has Will's clothes?

A: Mm-hm.

Q: What else is in that bag?

A: Um, last all I knew, it was just clothes. Don't know what else was in it. That I, I, I never went in that bag, so.

Q: OK. So was that bag like zipped up?

A: Yeah, it was unzipped, but I, it was his, it was his personal clothes, but I never looked in it to see what he kept in it or anything, so.

Q: So he had some clothes in there?

A: Yeah.

Q: Um, and that's a duff--, like a duffel bag, or...

A: Yeah.

Q: ...luggage with wheels?

A: Um-hm.

Q: What else is around that area?

A: There was a chair.

Q: OK. No, but, um, was there clothes on the ground?

A: Yeah. I don't, I don't know what it was. On the ground, clothes that needed to get washed. That he just threw in the corner.

Q: They were his clothes, though?

A: I think he was gonna wash some of his t-shirts or whatever and try and get rid of 'em.

Q: So, but it was his clothes

A: Um-hm.

Q: Not yours?

A: No, no.

Q: OK.

A: My clothes were all in the bedroom.

Q: OK. What else? So, there's the DVD, there's this black bag, and then there's Will's clothes. What else is in that corner?

A: I think that was it.

Q: OK. And the corner, just so I know that, what you're talkin' about. There's one wall that's almost like a closet that has like a circuit panel, like a fuse box.

A: Um-hm.

Q: And then there's that wall, that's the window.

A: Um-hm.

Q: OK. You said that there was a chair there?

A: Um-hm.

Q: Describe the chair.

A: It was like a pink chair, with flowers on it, with the seat would like sink in when you'd go to sit.

Q: What material was it?

A: Felt like cloth, but I'm really not sure what kind of material it was.

Q: How, how big was the couch? Was it for, was it a single seat, a two seat...

A: The ch...

Q: ...or three seat?

A: The chair was a single seat.

Q: We're talkin' about in this corner.

A: That was just a single seat.

Q: Like an armchair? Like a, a good-sized chair?

A: Um-hm.

Q: OK. Anything on the chair? (Inaudible.)

A: I don't think so. I don't remember. I know he'd put stuff on the chair, but then he'd like put it in the closet. So I don't remember if there was anything on that chair.

Q: OK. What el--, what else was in that corner?

A: That was it.

Q: OK. Um. Was that chair up against the wall, or was it pulled out, like?

A: It was, I tried to keep it away from the heater, but sometimes, the baby would come and like, he's strong, and he'd like push it back and stuff, so.

Q: OK. Do you know if it was up against the heater or not?

A: I really don't know.

Q: OK.

A: I w--, I didn't really pay attention.

Q: OK. How big is this heater that you're talkin' about?

A: The same size as the one that's in the bedroom.

Q: OK. And is there a thermostat for that heater?

A: It was like a um, was like a knob on it, but.

Q: On the actual heater itself?

A: Yeah, but I couldn't turn it off or on. It came on as it wanted.

Q: Was there like a, was there a knob on it to turn it on and off?

A: The knob was broken, but there was like a metal piece that you could turn, but it didn't work.

Q: Would it turn left and right and, uh, the knob, the uh...

A: You, you...

Q: ...metal piece.

A: You could try it with finger nail clippers, but it would still, you'd turn it off, but you'd feel hot air comin' up. You'd turn it the other way, and you'd still feel the hot air comin' up. So.

Q: OK. How...

A: It was...

Q: ...how long was that heater actin' up?

A: Since we moved in. Since July of '08.

Q: But you were able to turn the knob back and forth, it just didn't change?

A: Uh-hm. You gotta use fingernail clippers for it.

Q: Did you tell the landlord about it at all?

A: 'Cuz I had honestly didn't think it was.

Q: Did you tell him? I didn't hear you. Yes or no?

A: No.

Q: No.

A: Yeah I didn't think it was like a big thing.

Q: OK. Um, so in that corner, you have the DVD, you have his bag, you have some of his clothes, there's a chair. Anything else?

A: I don't think. No.

Q: And that's the area that you saw the smoke coming from?

A: Um-hm.

Q: OK. And you're telling you never saw any flames?

A: Not 'til I got outside.

Q: And you didn't see the flames until the window broke?

A: Um-hm.

Q: OK. Um, I'm just gonna have you draw, if you can. The uh, so when you come in, this is Spruce Street here. And we're just drawin' the kitchen-living room area. Um, it's somewhat square, right?

A: Um-hm.

Q: This is your bedroom door?

A: Yeah.

Q: The door here is from the hallway?

A: Yeah.

Q: And the back hall. Is there a closet or something right here?

A: When you first come in that door, you go in the door, in the front door, there was a closet that had, um, jackets, a lot of sneakers.

Q: So when you come into the apartment, you come in from the back hallway. This is the door to your apartment.

A: Um-hm.

Q: What's right here on your right?

A: A closet.

Q: OK. And then there's a circuit panel right here?

A: Mm-hm.

Q: This is where your kitchen is set up. Where's y--, is your bathroom right in here?

A: Yeah.

Q: OK. And then the window's somewhere here, correct?

A: Mm-hm.

Q: If you can, just draw, um, I want, where the heater is.

A: This is where the heater'd be...

Q: And that's the fuse panel.

A: The heater'd be like right here somewhere...It'd be right around there.

Q: OK. If, is the heater under the window?

A: There's one under the, there's two of them in the living room.

Q: OK. Draw them both please.

A: This one underneath this window...This one the knob was broken but you use fingernail clippers, and you can turn it off and on. But the other...

Q: This was the one that wasn't actin' up?

A: No, this is the one that was.

Q: OK, so this one over by your bedroom door is the one that would turn on and off on its own?

A: Um-hm.

Q: OK. Um, so, just write next to that th--, like broken, or. 'Cuz that's the one that you're saying turned on and off.

A: Yeah.

Q: OK. And this one you said was workin' fine, you just needed...

A: Fingernail clippers to get it on and off.

Q: OK. Um, where is this black duffel bag?

A: In this corner right over here is where he had, had his bag.

Q: That's over by the bedroom?

A: Um-hm.

Q: Just write that. Just write bag. And that's where you saw the smoke comin' from?

A: Um-hm.

Q: OK. What is along this wall here? Where is the chairs?

A: The chair is right about in front of that heater. And there's a couch in front of this one.

Q: Write couch on that one. What else is along this wall?

A: Um, that was it. The clo--, there was a closet, and that was it on that wall.

Q: OK. Um, can you just put an X and circle it where you saw the smoke coming from?

A: Over in this area. Near this heater.

Q: And then circle it. OK, so...

A: And that...

Q: ...I just want to be clear. So this is over, you see the smoke over by the bedroom door, not by the door to the back hallway out to Spruce Street?

A: Yeah.

Q: OK. What else is in this room?

A: The--, then you get a, there's a frigerator, which is...

Q: Where's that?

A: It's it was like next to the apartment wall next door.

Q: OK, so. This is the Spruce Street wall.

A: No, it's not on the Spruce Street wall.

Q: OK, is it on the wall with the bedroom?

A: No.

Q: OK, what wall is it on?

A: That wall.

Q: By the bathroom?

A: Near...

Q: Or was it on the bathroom wall?

A: It was near. Because you walk in...Like, I, I know where it is in my head, but drawin' it out, it's like...

Q: OK, so if you walk in the back door, if you walk in the back door, the closet's on your right, the, there's a, the couch is on your right...

A: Um-hm.

Q: The window. Now where...

A: It's across from the couch.

Q: OK. So.

A: It's like right about here.



Q: So if this is your couch here?

A: You get the fridge about here.

Q: OK. It's not in the middle of the room, though, right?

A: No, it's on, it's on a wall, but it's like, in front of the couch.

Q: OK. OK. And then, is there a countertop along this wall here?

A: Yes.

Q: OK.

A: And there's this, the stove is right next to the bathroom.

Q: OK. What else is in there? Is there a table? OK, so you have a couch, a chair, your kitchen, your appliances. There's no table.

A: No.

Q: Is there like a table in front of one of the couches? Nothin' at all? OK. Is there, um, any clothing in the kitchen area?

A: I don't think so.

Q: OK. And then you said the bag's in this corner by the, uh, bedroom.

A: Mm.

Q: What's between the couch and the...

A: Um.

Q: ...the chair?

A: He had, um, found a little, um, uh some--, somebody had given him like a little, um, um clear dresser, one of them little, um, things with wheels with the clear drawers that rolls. And he had, um, some kind of like um, like a radio or like a little stereo.

Q: OK, and that's between the two chairs?

A: Um-hm.

Q: OK. So there's some, why don't you just draw what it, how, whatever you think it is.

A: Yeah so there's a little...and then there's like a radio on top.

Q: OK.

A: That had a...

Q: What's in this corner here? Nothin'?

A: Um-um.

Q: So there's nothin' on the floor there? There's nothin'...?

A: Uh, I think he had sneakers over there.

Q: Uh-huh. But no clothing?

A: No clothing.

Q: Um, did, you didn't stack anything in that corner? Up, you know where the fuse panel is right?

A: Yeah, no, I didn't have anything stacked in there.

Q: Nothing?

A: I had stuff in the closet though.

Q: But nothing between the chair...

A: Mm.

Q: ...and either the window on the floor?

A: Um-um.

Q: Nothing?

A: Except for his sneakers. But I didn't have anything.

Q: OK. So. Now, anything else in here that you want to put in?

A: (Shakes head no.)

Q: Alright. OK. So, you hear the smoke alarms, you go outside. As you go outside, you see Will approaching the building from the right.

A: Um-hm.

Q: What do you do?

A: I tell him, like, the house is on fire, the house is on fire.

Q: OK.

A: And he's like, what do you mean? What do you mean? The house is on fire, the house is on fire.

Q: And then what did the, what did you guys do?

A: He was like, oh my god. And then there was people comin' by in a car. I had no idea who they were. They...

Q: What kind of car was it, do you know?

A: It was a Honda.

Q: OK, they were in a Honda?

A: Yeah.

Q: What did they do?

A: An-, an-, there was a guy, he got out, and he, he, he, he busted that door open. And Will...

Q: Does, does Will have keys to this apartment?

A: Yes, but we didn't, neither one of us had a key to that door. I didn't lock it, but it like locked on its own.

Q: So you guys don't have a side, a key to the side door?

A: No.

Q: You just, was the lock broken, or you just weren't given a key?

A: We just weren't given a key.

Q: OK. So, that door locked, and you couldn't get back in? OK. So, the passer by, what's he do?

A: He was, he was big, and he kicked it in. And Will went in. He was gonna go in the apartment, but he said the smoke was too strong, and he came right back out.

Q: OK. Did the passerby go in the building?

A: I don't believe so.

Q: OK. Who else was with the passerby?

A: Um, his wife, or his, or his girlfriend.

Q: Anyone else?

A: They're the ones that called, um, 911.

Q: They called 911?

A: Yes.

Q: OK. Then what did you do?

A: We went, um, we went across, after the window broke, we went across the street.

Q: OK.

A: He's like, oh my god, oh my god, I can't believe this just happened. Oh my god, oh my god.

Q: OK. Then what happened?

A: And then the, um, you guys came, and the fire came, whatever. A bunch of ambulances came. And, I, I went to the um, to the hospital. 'Cuz I had inhaled some smoke just tryin' to get out the door. Burnt my finger a little bit, but.

Q: OK. Did you, um, talk to the passerbys?

A: No, I didn't, I didn't sp--, I didn't talk to them.

Q: You didn't?

A: No.

Q: OK. When the fire department shows up, you're standing on the other corner. Is there a store there or something?

A: There was like a, um, a, a deli.

Q: OK. Not the convenience store, but?

A: Uh, yeah. No. He owned, he had bought, like a deli thing, but it wasn't open.

Q: OK.

A: 'Cuz it wasn't, didn't do very good business. So, he, he didn't open it.

Q: OK. So you're standing on the corner. What's, what's being said?

A: I was just, like looking at the place, like I didn't know what to do. And then the girls, the girl comes up. I real--, I don't know her name, I've never seen her in my life. And she's like, look, you started this, you started this. I was like, no.

Q: She accused you of starting it? OK. Why'd she do that?

A: I have no idea.

Q: OK. And then what, then what happens?

A: And then I go to the, um. Well then she comes back, and she like kicks me in the side of the face. I, I didn't know what the hell was goin' on. And she put her finger like right here in my eye. My eye was red for about a week.

Q: OK. Did you tell them anything? Or did you say anything to them? Why did she attack you?

A: I have no idea.

Q: Did Will say anything to her?

A: Not that I know of.

Q: OK. So the passerby just stops and tries to help. She calls 911, and then, eventually you two end up in a f--, an argument, a fight?

A: Um-hm.

Q: OK. Then what else happens?

A: I went to the, um, the hospital.

Q: Did you leave the scene at all? Did you go to somebody's house and then come back?

A: (Shakes head no.)

Q: So you stayed on that corner 'til the fire department...?

A: Then I see the am-, I see the am-, I see an EMT worker. I went up to him to ask him for help. But he was like, let me go see what's goin' on, and I'll come back to you.

Q: OK.

A: So I, I waited. And he got back to me. He's like, alright, we'll take you to the hospital. And I went up to the hospital. They treated me for some smoke inhalation. And I met with the Red Cross there, they placed me at the um, Windham in Chelsea. And that's where I got there about six o'clock on Christmas morning. And us, we was there until that Tuesday morning, the, I wanna say the 28<sup>th</sup> of December. And then we went to the Revere DTA. They placed me and Dahvon in the Colonial Traveler Inn in Saugus. And that's where, where, that's where we are currently staying.

Q: OK. Um, you spoke with us at the, the hospital, correct?

A: Yes.

Q: OK. You talked to us, and we interviewed you?

A: Yes.

Q: Alright. Sarge?

**By Sergeant Conley:**

Q: Um, you said you burnt your finger?

A: Yeah.

Q: I never s-, we never, I, we never. Explain what happened?

A: The, the doorknob was so hot when I went to touch it. I put, I always put my finger like that when I open it, and it had touched it.

Q: Which doorknob is that?

A: The um, the one comin' out the apartment.

Q: The first one?

A: Um-hm.

Q: Your apartment door or the outside door, which?

A: The, the apartment door. Comin' out.

**By Trooper Sweeney:**

Q: Going into that back hallway?

A: Um-hm.

Q: OK.

A: I did-, I, I didn't notice my finger until I got to the hospital. I looked at it. It looked like a big blister. I tried to pop it. But I just left it, and...

**By Sergeant Conley:**

Q: Where was it on your finger exactly?

A: Right here, where it's, where it's purple still a little bit. All right there.

Q: Kinda right on the very tip?

A: Yeah.

**By Trooper Sweeney:**

Q: OK. Are you left handed or right handed?

A: Right handed.

Q: And that's on your left hand?

A: Yes.

Q: ... I'm sure you were pretty pissed at Willie for giving you a hard time for not picking up the money from his sister. He takes off to go get some money. You're not happy with him.

A: I, I honestly didn't mind that he went out.

**By Sergeant Conley:**

Q: Listen to me one second because I want you to understand. How serious this is. What you told us today, what you told us at the hospital, and what you s-, and what you've said in between. And people we've talked to, the evidence from fire marshal's office, and, most importantly, what Willie's sayin'.

A: Will wasn't there, so he doesn't really know what happened there.



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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
NO. SUCR2011-10211

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COMMONWEALTH OF MASSACHUSETTS \*  
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-V- \*  
\*  
MELISSA PFEIFFER \*  
\* \* \* \* \*

EXCERPT FROM THE PROCEEDINGS

BEFORE: HONORABLE JEFFREY A. LOCKE  
Suffolk Superior Courthouse  
Boston, Massachusetts 02108  
Tuesday, October 13, 2015

Julie S. Higgins, Assistant District Attorney  
On behalf of the Commonwealth of Massachusetts

James M. Doyle, Attorney at Law  
On behalf of the Defendant, Melissa Pfeiffer



NANCY M. KING, CVR  
OFFICIAL COURT REPORTER  
SUFFOLK SUPERIOR COURT

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(None.)

P R O C E E D I N G S

TUESDAY, OCTOBER 13, 2015

EXCERPT FROM THE PROCEEDINGS:

THE COURT: On the Motion for Bill of Particulars, the defendant is charged with what? First degree murder?

MS. HIGGINS: Second degree murder.

THE COURT: I know I have dealt with this case in the past. I think I dealt with a motion to dismiss on *McCarthy* principles, but that goes back several years. What is the Commonwealth's theory in this case?

MS. HIGGINS: Your Honor, it is our theory that the defendant intentionally set her boyfriend's items on fire inside their apartment, and that once the fire started to overwhelm the inside of their apartment, she fled and just waited outside. The apartment was inside a five-unit apartment building, resulting in the death of a woman living on the second floor. Another gentleman jumped out a second-floor window, sustaining serious injuries. Two firefighters were also injured as they battled the blaze.

So it is our position that this defendant intentionally started this fire by

1 setting her boyfriend's possessions on fire  
2 inside their apartment building causing --

3 THE COURT: That proves the crime of  
4 arson.

5 MS. HIGGINS: Correct, and then --

6 THE COURT: Now let's get to the  
7 murder.

8 MS. HIGGINS: On second degree based on  
9 arson being a twenty-year felony, it would then  
10 result in --

11 THE COURT: So you plan to try this as  
12 a felony murder?

13 MS. HIGGINS: Correct.

14 THE COURT: And that's the only theory  
15 that you are proceeding under?

16 MS. HIGGINS: That she intentionally  
17 set this fire, and by intentionally starting this  
18 fire, it resulted in the death of Ms. Blanchard.

19 THE COURT: Mr. Doyle, why do you need  
20 a Bill of Particulars on that presentation?

21 MR. DOYLE: I don't. I need that  
22 presentation reduced to writing so that it is  
23 available for the trial judge so that we can work  
24 on it to formulate instructions and preliminary  
25 matters.

1 THE COURT: Why can't I endorse the  
2 motion that there is no action necessary based on  
3 the Commonwealth's representation that it will  
4 proceed on second degree murder on a theory of  
5 felony murder, the underlying felony being the  
6 intentional setting of a fire to an occupied  
7 dwelling?

8 MR. DOYLE: As long as the language  
9 makes it clear that it's the setting of the fire,  
10 not the failing to act after a fire --

11 THE COURT: That's what I've just  
12 heard. Ms. Higgins?

13 MS. HIGGINS: Correct, she  
14 intentionally set the fire. That's our position.

15 THE COURT: That's it?

16 MS. HIGGINS: Correct.

17 THE COURT: All right. I have endorsed  
18 the motions as follows: "Upon hearing the  
19 Commonwealth representing that it will proceed on  
20 a theory of second degree felony murder, the  
21 underlying felony being the crime of arson,  
22 further Particulars are not required."

23 MR. DOYLE: Excuse me, Your Honor.

24 THE COURT: Yes, sir?

25 MR. DOYLE: That does not actually

1 fully capture what I had agreed to. Arson could  
2 arguably be committed in two ways: one by  
3 setting a fire, and one by allowing an ongoing  
4 fire to go forward. I understand the  
5 Commonwealth to be representing that it is in  
6 terms of setting the fire that it is premising  
7 the liability.

8 THE COURT: If I add, "The underlying  
9 felony being the crime of arson by intentionally  
10 setting fire to or within an occupied dwelling,"  
11 does that do it for you?

12 MR. DOYLE: Well, I understand the  
13 allegation to be setting fire to his clothing in  
14 particular.

15 THE COURT: Within an occupied  
16 dwelling.

17 MR. DOYLE: Setting fire to the  
18 clothing within an occupied dwelling, yes.

19 THE COURT: And I have it in the  
20 disjunctive. I have it in the disjunctive,  
21 "Setting fire to or within an occupied dwelling".  
22 That's what they are going to argue, I take it,  
23 is the clothing is the initial igniting device,  
24 so to speak.

25 MR. DOYLE: Well, as I understand it,

1           Your Honor, the intent that's alleged is to set  
2           fire to the clothing.

3                   THE COURT: "By intentionally setting  
4           fire", yes.

5                   MR. DOYLE: To the clothing, not to the  
6           building.

7                   THE COURT: I'm satisfied with that.

8           That does it for me.

9           END OF EXCERPT.

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C E R T I F I C A T E:

I, Nancy M. King, Official Court Reporter,  
do hereby certify that the foregoing pages 1 - 7  
represent a true and accurate record of a portion of  
the proceedings held concerning the aforementioned  
matter before Honorable Jeffrey A. Locke at Suffolk  
Superior Court on Tuesday, October 13, 2015, to the  
best of my knowledge, skill and ability.

/s/ Nancy M. King

Nancy M. King

Official Court Reporter



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## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPARTMENT  
SUCR 2011-10211

COMMONWEALTH

v.

MELISSA PFEIFFER

---

**COMMONWEALTH'S REQUESTS FOR PRE-CHARGE JURY INSTRUCTIONS**

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Now comes the Commonwealth in the above-captioned matter and, pursuant to Mass. R. Crim. P. 24(b), respectfully requests this Honorable Court to include within its pre-charge to the jury the following instructions:

<u>ELEMENTS OF THE CRIMES</u> .....	2
1. Murder in the Second Degree .....	2
2. Felony Murder in the Second Degree.....	4
3. Assault and Battery Dangerous Weapon SBI (Indictment 2) .....	5
4. Arson of a Dwelling (Indictment 3) .....	6
5. Injury to Firefighter (Indictments 4 & 5).....	8

2-1-16 *filed*

**ELEMENTS OF THE CRIMES****1. Murder in the Second Degree<sup>1</sup> (Indictment 01)**

Murder is the unlawful killing of a human being. The Commonwealth alleges the defendant committed murder in the second degree. The Commonwealth alleges murder in the second degree on the following theories: plain and strong likelihood of death and felony murder. You are to consider each of these two theories, and may find the defendant not guilty, or guilty on one or both of these theories.

Your verdict must be unanimous, whether it be "not guilty" or "guilty" of one or more theories of murder. To find the defendant guilty on any of these theories of murder you must be unanimous, that is, all the deliberating jurors must agree that the Commonwealth has met its burden of proving every required element of that theory beyond a reasonable doubt.

**A. Murder in the Second Degree**

I will first define the elements of murder in the second degree. In order to prove murder in the second degree, the Commonwealth must prove the following elements:

1. The defendant caused the death of Crystal Blanchard
2. The defendant intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

**(1) Causation:** The first element is that the defendant caused the death of Crystal Blanchard. A defendant's act is the cause of the victim's death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.

*In order for you to find that the defendant killed Crystal Blanchard, the prosecution must prove beyond a reasonable doubt that the injuries suffered by Ms. Blanchard on December 24, 2010, were the proximate cause of her death. Proximate cause is a cause which in the natural and continuing sequence of events produces the*

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<sup>1</sup> The instructions on murder have been taken from the Supreme Judicial Court's Model Jury Instruction on Homicide (March 2013). Where the Commonwealth has supplemented the model instructions with additional statements of law that have been approved by appellate courts, the Commonwealth has indicated the additional language and provided case citations for the propositions.

*death, and without which, the death would not have occurred.<sup>2</sup> There may be more than one proximate cause of death. Under the law, the defendant's conduct need not have been the only cause of death. It is not necessary that it be the sole cause of death. If the defendant sets into motion the events from which death follows as a consequence of the defendant's actions, the defendant's conduct caused her death in the law, even if other causes cooperated in producing the death. So, as I said, it need not be the sole cause.<sup>3</sup>*

**(2) Intent to Kill:** The second element is that the defendant:

- a. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

To analyze this prong you must first determine whether the defendant intended to perform the act that caused the victim's death. If you find that she intended to perform the act, you must then determine what the defendant herself actually knew about the relevant circumstances at the time she acted. Then you must determine whether, under the circumstances known to the defendant, a reasonable person would have known that the act intended by the defendant created a plain and strong likelihood that death would result.

<sup>2</sup> See *Commonwealth v. Rhoades*, 379 Mass. 810, 825 (1980), quoting California Jury Instructions, Criminal § 8.55 (4th rev. ed. 1979) ("To be sufficient on the issue of proximate cause, the evidence must warrant the inference that these acts were such that they, 'in the natural and continuous sequence, produced the death, and without which the death would not have occurred'").

<sup>3</sup> "The defendant's acts need not be the sole or exclusive cause of death." *Commonwealth v. Santiago*, 425 Mass. 491, 503-04 (1997). "Where a defendant causes an injury which, along with other contributing factors or medical sequella of the injury, leads to death, jurors may determine that the defendant's acts were the proximate cause of the injury." *Commonwealth v. Perry*, 432 Mass. 214 (2000). See also *Commonwealth v. Davis*, 403 Mass. 575, 582 (1988) (that extreme cold also contributed to death does not relieve defendant of responsibility); *Commonwealth v. Vanetzian*, 350 Mass. 491, 492-95 (1966) (defendant's conviction affirmed where operation on gunshot wound caused by defendant led to peritonitis and three additional operations; where cause of death was determined to be "intra-abdominal abscesses, bronchopneumonia, and left empyema due to gunshot wound;" and, where autopsy could not "positively exclude" chronic bronchitis as cause).

## 2. Felony Murder in the Second Degree

Next, I will define the elements of felony-murder in the second degree. A defendant is guilty of felony-murder in the second degree if the Commonwealth has proved beyond a reasonable doubt that the victim was killed during the defendant's commission or attempted commission of a felony with a maximum sentence of less than life imprisonment.

To prove the defendant guilty of felony-murder in the second degree, the Commonwealth must prove the following elements beyond a reasonable doubt:

- (1) The defendant committed a felony with a maximum sentence of less than imprisonment for life;
- (2) The death occurred during the commission or attempted commission of the underlying felony; and
- (3) The defendant acted with a conscious disregard for the risk to human life.

I will explain each element in more detail.

**(1) Non-Life Felony:** First, the Commonwealth must prove that the defendant committed a felony with a maximum sentence of less than imprisonment for life. The Commonwealth alleges that the defendant committed arson (indictment number 03). I instruct you this crime is a felony with a maximum sentence of less than life imprisonment.

In order for you to decide whether arson occurred in this case, I must instruct you on all elements of this offense.

*The Commonwealth alleges this underlying felony in a separate indictment, and I will instruct you in just a moment on the elements that must be proven beyond a reasonable doubt.*

**(2) During the Commission of the Felony:** The second element is that the killing occurred during the commission or attempted commission of the underlying felony. The Commonwealth must prove beyond a reasonable doubt that the killing occurred in connection with the felony and at substantially the same time and place. A killing may be deemed to be connected with the felony if the killing occurred as part of the defendant's effort to escape responsibility for the felony.

**(3) Inherently Dangerous/Conscious Disregard:** The third element is that the underlying felony was inherently dangerous or defendant acted with a

conscious disregard for the risk to human life. You must determine in the circumstances of this case whether the defendant committed arson. I instruct you as a matter of law the crime of arson is inherently dangerous to human life.<sup>4</sup> You may also find that the defendant committed this felony with a conscious disregard for the risk to human life if you find that the defendant intended the felony to occur or the felony did occur in a way known by the defendant to be dangerous to life or likely to cause death.

**3. Assault and Battery with a Dangerous Weapon Causing Serious Bodily Injury (Indictment 02)**

The defendant is also charged with having committed an assault and battery by reckless conduct, with a dangerous weapon, upon Paul Pitts, thereby causing serious bodily injury to Paul Pitts. In order to prove the defendant guilty of having committed this offense, the Commonwealth must prove three things beyond a reasonable doubt:

- (1) That the defendant acted recklessly;
- (2) That the defendant's reckless conduct included an intentional act which resulted in serious bodily injury to Paul Pitts;
- (3) That the injury was inflicted by a dangerous weapon.

First, the Commonwealth must prove the defendant acted recklessly. It is not enough that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if she knew, or should have known, that such actions were very likely to cause substantial harm to someone, but she ran that risk and went ahead anyway. The defendant must have intended her acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that she intended to injure or strike Paul Pitts, or that she foresaw the harm that resulted. If the defendant actually realized in advance that her conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if she was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant,

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<sup>4</sup> The Massachusetts Supreme Judicial Court has long recognized arson as an inherently dangerous felony. *See Commonwealth v. Matchett*, 386 Mass. 492, 505 n.15 (1982); *Commonwealth v. Bell*, 460 Mass. 294, 308 (2011).

would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Second, the Commonwealth must prove the conduct caused serious bodily injury to Paul Pitts. The defendant's act is the cause of Paul Pitt's injury where the act, in a natural and continuous sequence, results in injury, and without which injury would not have occurred. There may be more than one proximate cause of the injury. Under the law, the defendant's conduct need not have been the only cause of injury. It is not necessary that it be the sole cause of injury. If the defendant sets into motion the events from which injury follows as a consequence of the defendant's actions, the defendant's conduct caused his injury in the law, even if other causes cooperated in producing injury. So, as I said, it need not be the sole cause.

For the purposes of this section "serious bodily injury" shall mean bodily injury which results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

Third, the Commonwealth must prove the injury was inflicted by a dangerous weapon. An item that is normally used for innocent purposes can become a dangerous weapon if it is intentionally used as a weapon in a dangerous or potentially dangerous fashion. The law considers any item to be a dangerous weapon if it is intentionally used in a way that it reasonably appears to be capable of causing serious injury or death to another person. For example, a lighted cigarette can be a dangerous weapon if it is used to burn someone; or a pencil, if it is aimed at someone's eyes. In deciding whether an item was intentionally used as a dangerous weapon, you may consider the circumstances surrounding the alleged crime, the nature, size and shape of the item, and the manner in which it was handled or controlled.

#### **4. Arson of a Dwelling House (Indictment 03)**

In order to prove arson the Commonwealth must prove the following elements beyond a reasonable doubt:

- (1) The defendant set fire to, burned, or caused a building to burn;
- (2) The building was a dwelling house, a building adjoining to or adjacent to a dwelling house, or a building whose burning resulted in a dwelling house being burned,
- (3) The defendant acted willfully and maliciously.

The first element the Commonwealth must prove beyond a reasonable doubt is the defendant set fire to, burned, or caused to be burned the building in question. This requires that some portion of the building must actually have been on fire and burned. There is, however, no requirement that the building be consumed by fire or destroyed. Even charring is sufficient evidence of burning.

The second element the Commonwealth must prove beyond a reasonable doubt is that the building burned was a dwelling house, a building adjoining or adjacent to a dwelling house, or any building the burning of which resulted in a dwelling house being burned. The phrase "dwelling house" means and includes all buildings used as dwellings, whether as apartment houses, tenement houses, hotels, boarding houses, dormitories, hospitals, institutions, sanatoria or other buildings where people live or reside. It is not necessary that the building be occupied at the time of the burning, but the Commonwealth must prove that the building is capable of being occupied as a dwelling, is adjoining or adjacent to a dwelling house or is a building the burning of which resulted in a dwelling house being burned. Further it does not matter if the defendant owned the dwelling or if it was owned by another.

The third element the Commonwealth must prove beyond a reasonable doubt is that the defendant willfully and maliciously set fire to or caused the building to be burned. Willfulness and malice are required to constitute the state of mind necessary to commit arson. The word willfully means that the act was intentionally and by design rather than an act that is thoughtless or accidental. A person acting willfully intends both his or her conduct and it results in harm. This requirement of willfulness means that accidentally or negligently caused burnings are not arson. The Commonwealth must also prove beyond a reasonable doubt that the defendant acted maliciously or with malice. The terms "malice" or "maliciously" have different meanings under this statute than the ordinary definition of the terms. Malice in the context of this arson instruction characterizes all acts done with an evil disposition, with a wrong and unlawful motive or purpose, or the willful doing of an injurious act without lawful excuse. A burning is malicious if it is done with any wrongful or unlawful motive or purpose and without lawful excuse.

**5. Injury to Firefighter (Indictments 04 & 05)**

The defendant is also charged with causing injury to a firefighter during the performance of his duty. In order to prove the defendant guilty of this crime the commonwealth must prove the following elements beyond a reasonable doubt:

- (1) That the defendant committed the crime of arson; and
- (2) it resulted in injury to a firefighter in the performance of his duty.

First, the Commonwealth must prove the defendant committed the act of arson. Arson described above, is proven where the defendant willfully and maliciously set fire to, burned, or caused a building to burn a dwelling house.

Second, the Commonwealth must prove that the arson resulted in injury to the firefighter in performance of his duty. The injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.



Respectfully Submitted  
For the Commonwealth,

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~~Dated: January 31, 2016~~

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

SUPERIOR COURT DEPT.  
NO. SUCR-2011-10211

COMMONWEALTH

V.

MELISSA PFEIFFER

DEFENDANT'S RESPONSE TO COMMONWEALTH'S PRE-CHARGE REQUESTS**1. Regarding Second Degree Murder.**

At the hearing on the defendant's motion for bill of particulars, held on October 13, 2015, Judge Locke inquired into the basis of the charge:

THE COURT: So you plan to try this as a felony murder?

MS. HIGGINS: Correct.

THE COURT: And that's the only theory that you are proceeding under?

The Commonwealth did not dispute or explicitly Judge Locke's understanding that this matter was to be tried exclusively as a felony murder. A transcript of the hearing is submitted simultaneously with this pleading. Five years into the prosecution in the midst of jury selection the Commonwealth should not be permitted to add a theory of liability.

**2. Regarding Arson**

The Commonwealth's proposed pre-charge on the mental elements of the crime of arson includes obsolete "evil mind" language.

The defendant proposes that if the Court intends an elaborate pre-charge on the order of that requested by the Commonwealth on the elements of the offenses, the better language is contained in the modern Model Instructions, (modified here to adapt it to this case.):

*The third element the Commonwealth must prove beyond a reasonable doubt is that the defendant willfully and maliciously set fire to or caused the building to be burned.*

*Willfulness and malice are required to constitute the state of mind necessary to commit arson.*

*The word willfully means that the act was intentional and by design, rather than an act that is thoughtless or accidental. A person acting willfully intends both his or her conduct and the resulting harm. The requirement of willfulness means that accidentally or negligently caused burnings are not arson. **Willfulness means to set a dwelling house on fire, not to light a fire in general.** Commonwealth v. Dung Van Tran, 463 Mass. 8, fn. 21 (2012).*

### 3. Regarding Felony Murder

a). The defendant objects to the inclusion of the language “I instruct you as a matter of law the crime of arson is inherently dangerous to human life.” The holdings of Commonwealth v. Matchett, 386 Mass. 492, 505 n.15 (1982); Commonwealth v. Bell, 460 Mass. 294, 308 (2011) on which the Commonwealth relies, do not support this direction, and this case is expected to present a jury issue on the question of conscious disregard of human life. While it is true that Commonwealth v. Matchett, *supra*, does list arson among previously listed inherently dangerous felonies, Matchett itself involved the underlying felony of extortion, and did not separately analyze whether Matchett’s new expression of the felony murder rule applied to arson. Arson can be committed in many ways---for example burning a section of an isolated, unoccupied dwelling---that are not dangerous to human life. Commonwealth v. Bell, *supra*, involved a case in which the splashing of gasoline on a victim supplied ample proof of conscious disregard of human life without the necessity of resorting to any categorical assignment of all arsons as inherently dangerous. The defendant submits that there will be evidence in this case requiring a jury decision on the question of conscious disregard of human life. To withdraw this issue from the jury will violate the defendant’s rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States, and Article XII of the Massachusetts Declaration of Rights.

b). The defendant requests that the Court inform the jurors that:

*In Felony Murder the act of violence that is an element of the underlying felony may not be the same act that caused the victim's death. Where an act of violence is an element of the underlying felony, you may find felony-murder only if you find an act that is separate and distinct from the violent act that resulted in the victim's death."*

#### 4. Regarding Mental Impairment.

The defendant requests that the Court instruct the jurors that:

*Whenever the defendant's knowledge or intent must be proved, the defendant's culpability rests upon proof of such knowledge or intent. The Commonwealth must prove the requisite knowledge or intent beyond a reasonable doubt in order to prove that the defendant committed the crime.*

*Whenever the Commonwealth must prove the defendant's intention to do something, you should consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proof.*

*Likewise, whenever the Commonwealth must prove the defendant's knowledge of any facts or circumstances, you should consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proof.*

#### 5. Regarding Accident

The defendant requests that the Court instruct the jurors that:

*The defendant does not have to prove anything in a criminal trial. The Commonwealth must prove beyond a reasonable doubt every element of the crime charged.*

*If in this case there is evidence that the burning of the dwelling was an accident, you must determine whether the defendant intentionally burned a dwelling or whether the burning of the dwelling that occurred was an accident.*

*An accident is defined as an unexpected happening that occurs without intention or design on the defendant's part. It means a sudden, unexpected event that takes place without the defendant's intending it. Stated otherwise, an accident is an unintentional event occurring through inadvertence, mistake, or negligence.*

*If an act is accidental, it is not a crime. When considering the evidence, bear in mind that the defendant does not have to prove anything. The Commonwealth must prove beyond a reasonable doubt that what occurred was not an accident. If the Commonwealth has failed to prove to you beyond a reasonable doubt that what occurred was not an accident, then you must find the defendant not guilty.*

Respectfully submitted,  
MELISSA PFEIFFER,

By her counsel:

s/  \_\_\_\_\_

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SUPERIOR COURT DEPARTMENT  
SUCR 2011-10211

COMMONWEALTH

v.

MELISSA PFEIFFER

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**COMMONWEALTH'S REQUESTS FOR JURY INSTRUCTIONS<sup>1</sup>**

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Now comes the Commonwealth in the above-captioned matter and, pursuant to Mass. R. Crim. P. 24(b), respectfully requests this Honorable Court to include within its charge to the jury the following instructions:

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<sup>1</sup> The Commonwealth reserves the right to supplement these proposed instructions as the Defendant has not yet presented her alleged diminished capacity defense.

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## **GENERAL INSTRUCTIONS**

### **1. Function of the Court**

My function as the trial judge is to conduct the trial of a case in an orderly, fair and efficient manner, to rule upon questions of law arising during the course of the trial, and to instruct you as to the law which applies to this case. I would ask you, now, to give me careful attention as I explain the law to you. It is your obligation and duty to accept the law as I explain it to you, and that's true whether you agree with the law or disagree with the law. You must accept the law as I explain it to you. You should consider all of my instructions as a whole. You may not disregard any instruction of the Court or give special attention to any one particular instruction or question the wisdom of any rule of law.

### **2. Function and Duty of the Jury**

You, as jurors, are the sole and exclusive judges of the facts of the case. You alone determine what evidence to accept and how much weight you wish to give that evidence. You look to the evidence to determine the facts of the case and then apply the law to it, as I explain the law to you. You should determine the facts based solely on a fair consideration of the evidence. You must be completely fair and impartial and you may not be influenced, in any way, by your person likes and dislikes, any sympathy

or bias you have or prejudice towards one side or the other, or how popular or unpopular the charges are with the general public.

You may not decide this case based on any speculation, guesswork or surmise, in other words, what other evidence might have been if it had been produced. You must look at the evidence presented and the fair inferences from the evidence and apply the law to it in making your decision. You should not engage in any speculation or guesswork and you should not consider anything I've done on ruling on evidentiary matters, as indicative, in any way of what your verdict should be.

My actions during the trial in ruling on motions or objections by counsel, or in comments to counsel, or in questions to witnesses, or in setting forth the law in these instructions are not to be taken by you as any indication of my opinion as to how you should determine the issues of fact. If you believe that I have expressed or intimated any opinion as to the facts, you should disregard it. What the verdict shall be is your sole and exclusive duty and responsibility.

### **What Constitutes Evidence**

*See Mass. Jury Instructions – Criminal No. 2-1*

You may consider only the evidence properly admitted in this case. The evidence in this case consists of the sworn testimony of the witnesses, the exhibits received into evidence, and the stipulations between counsel.

Evidence consists of the testimony of the witnesses, but not the questions that were asked and not any answers that I excluded or told you to disregard. The opening statements, closing arguments, and any remarks and questions of the lawyers are not evidence and may not be considered as evidence by you. You must rely on your memory of the evidence, not the memory of any of the lawyers and not my memory.

The evidence also includes any exhibits that I allowed to be received in evidence in this case. You will have each of the \_\_\_\_\_ marked exhibits available to you for you to review in the jury deliberation room. You may give each exhibit whatever degree of



weight and importance you believe it is fairly entitled to receive. You should examine each exhibit thoroughly and consider the exhibits along with all the other evidence in this case in order to reach your verdict.

Third, a stipulation is an agreement among counsel that a certain fact is true. You must regard such agreed facts as true.

Let me assist you by explaining to you some things that have occurred during the course of a trial that are not evidence. You've seen references to the indictments, the pieces of paper that contain the formal charges against the defendant, Michael Stallings. They are not evidence and you may not draw any inference unfavorable to him simply by the fact that he has been charged. A question put to a witness is never evidence. It is the answer of the witness that constitutes the evidence. Anything stricken from the record is not evidence, and you may not consider it. Anything marked for identification, which has not been entered as an exhibit, is not evidence. And anything that you may have seen or heard outside this courtroom is not evidence, and you may not decide the case based on that.

Statements and arguments of counsel are not evidence. They are only intended to assist you in understanding the evidence and the contentions of the parties. If any reference by the Court or by counsel, either in opening or in closing remarks, to matters of evidence does not coincide with your own recollection of the evidence, it is your recollection which should control during your deliberations. As I just said, the questions asked by counsel of the witnesses are not evidence.

With respect to certain testimony of some of the witnesses, I have imposed limiting instructions. That is, I have ruled that certain evidence is before you for your consideration, not for whether the evidence itself is true, but simply for whether it bears upon some other issue in the case. You must keep in mind such limiting instructions when considering such evidence.

#### 4. **Presumption of Innocence**

*See Mass. Jury Instructions – Criminal, No. 1-1*

The defendant, Melissa Pfeiffer -- as are all defendants in criminal cases in this Commonwealth -- is presumed to be innocent of any crime. This is what is known as the presumption of innocence. That presumption remains with the defendant throughout the trial up to the point, if reached, where the Commonwealth proves the defendant's guilt beyond a reasonable doubt.

This legal presumption of innocence is no mere idle theory to be cast aside by the jury through mere caprice, passion, or prejudice. And the defendant is not to be found guilty upon suspicion or conjecture, but only upon evidence produced in this courtroom. *Commonwealth v. Drayton*, 386 Mass. 39, 46 (1982).

#### 5. **Burden of Proof**

*See Mass. Jury Instructions – Criminal No. 1-2*

The defendant has denied that he is guilty of the crimes charged in the indictments. The law presumes the defendant to be innocent of the charges against him. The defendant need not prove that he is innocent. The burden of proof is upon the Commonwealth. The presumption of innocence is a rule of law that compels you to find the defendant not guilty, unless and until the Commonwealth produces evidence, from whatever source, that proves the defendant is guilty beyond a reasonable doubt.

The mere fact that the defendant was arrested is not evidence of his guilt. The mere fact that the defendant was indicted by a grand jury is not evidence of his guilt. Again, an indictment is merely the form we use to bring a criminal charge against a person and to bring a case before the court and a jury. The defendant has pled not guilty to the indictments and the burden is on the Commonwealth to prove the essential elements of the offenses beyond a reasonable doubt. The burden of proof never shifts from the Commonwealth to the defendant.

The Commonwealth has the burden of proving each element of each charge against the defendant beyond a reasonable doubt, as I will define that obligation to you.

**6. Reasonable Doubt**

*Commonwealth v. Russell*, 470 Mass. 464, 477-78 (2015):

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charges made against him.

What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true. When we refer to moral certainty, we mean the highest degree of certainty possible in matters relating to human affairs — based solely on the evidence that has been put before you in this case.

I have told you that every person is presumed to be innocent until he or she is proved guilty, and that the burden of proof is on the prosecutor. If you evaluate all the evidence and you still have a reasonable doubt remaining, the defendant is entitled to the benefit of that doubt and must be acquitted.

It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough. Instead, the evidence must convince you of the defendant's guilt to a reasonable and moral certainty; a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act conscientiously on the evidence.

This is what we mean by proof beyond a reasonable doubt.

## 7. **No Speculation**

You are not to decide this case based on what you may have read or heard outside of this courtroom. You are not to engage in any guesswork about any unanswered questions that remain in your mind or to speculate about what the “real” facts might or might not have been. Guesswork, conjecture, or surmise are not an appropriate substitute for evidence and have no place in your deliberations.

You cannot engage in any speculation, conjecture or surmise about what other evidence may have been produced or what other witnesses might have said if they had been called. You cannot engage in speculation in any way. You must look at the evidence presented, decide what weight you wish to give it, apply the law to it to determine whether or not the government has met its burden of proof. So again, you must confine yourself to the evidence presented, not guesswork, speculation or surmise.

### **TYPES OF EVIDENCE**

There are two types of evidence and I am going to tell you what they are and explain them and give you an example of each and give you some rules that apply to them. They are called direct evidence and circumstantial evidence.

## 8. **Direct Evidence**

*See Mass. Jury Instructions – Criminal No. 2-3*

Direct evidence is the testimony of a witness asserting actual knowledge of a fact which he or she saw, felt, heard or gained from some other sense. When a jury is presented with direct evidence, the only question for you to decide is whether you believe the witness or disbelieve the witness, in whole or in part. You must weigh what the witness has said and then make a determination of the witness’s credibility.

## 9. **Circumstantial Evidence/Reasonable Inferences**

*See Mass. Jury Instructions – Criminal No. 2-4*

Circumstantial evidence is where the witness does not testify directly about the fact to be proven, but does testify to surrounding circumstances from which you could

draw a reasonable inference about the fact to be proved. I am now going to give you an example to explain the differences between the two types of evidence.

Assume, if you will, the fact to be proven is that the mailman delivered the mail at two o'clock on a Tuesday. A witness testifies that at two o'clock on the day in question, she sees the mailman deliver the mail. That is direct evidence of the fact to be proven. It's based on the sense of sight. You can accept or reject it, but it is direct evidence that the mailman delivered the mail.

Circumstantial evidence of the same fact to be proven that the mailman delivered the mail at two o'clock on a Tuesday would be that a witness testifies that he has lived at an address for several years. During the week, the mail is normally delivered around two o'clock. On the Tuesday in question, he left his house at noontime, checked his mail and it was empty, came back later in the afternoon, looked inside the mailbox, and found mail addressed to him inside the mailbox. That is circumstantial evidence that the mailman had delivered the mail. He did not see it but he has testified to surrounding circumstances from which you could draw an inference that the mailman delivered the mail.

What is an inference? An inference is simply a little step in reasoning in which you take some known information, you apply your experience in life to it, and you reach your conclusion. If, in that second example from those surrounding circumstances, you deduced that the mailman had delivered the mail, you might call it a "deduction." We call it an "inference" in the law.

You may draw an inference, jurors, even if it is not necessary or inescapable, provided it is warranted by the evidence and all the evidence and reasonable inferences therefrom to prove the defendant guilty beyond a reasonable doubt. So on direct evidence, the question is do you believe the testimony or accept it as true? In circumstantial evidence, the questions are: first, do you accept the testimony or believe

it is true; and secondly, do you draw an inference about the fact to be proven? There is an extra step. Both types of evidence are competent evidence in criminal cases.

The two things you have to remember about circumstantial evidence are as follows. The first is that you may draw inferences and conclusions only from facts which have been proven beyond a reasonable doubt. The second is that any inferences and conclusions that you draw must be reasonable and natural based on your commonsense and experience in life. In a chain of circumstantial evidence, it is not required that every one of your inferences and conclusions be inevitable, but it is required that each of them be reasonable and that they all be consistent with one another and that together they establish the defendant's guilt beyond a reasonable doubt.

The Commonwealth may rely solely on circumstantial evidence to prove their case. The evidence, while circumstantial in nature, is entitled the same weight as direct evidence. If the Commonwealth's case is based solely on circumstantial evidence, you may find the defendant guilty only if those circumstances are conclusive enough to leave you with a moral certainty – a clear and subtle belief that the defendant is guilty and there is no other reasonable explanation of the facts as proven. The evidence must not only be consistent with the defendant's guilt. It must be inconsistent with his innocence.

In summary, reasonable inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by evidence in the case. A conviction of a crime may rest entirely or in part upon circumstantial evidence.

#### **10. Nature of the Proof**

While the Commonwealth is required to prove the defendant's guilt beyond a reasonable doubt, the Commonwealth is not required to exclude every other possible hypothesis to the effect that a person or persons other than the defendant committed the offense. In other words, it is not necessary for the Commonwealth to prove that no

one other than the defendant could have performed the acts alleged in this case. That another person might have had such an opportunity goes only to the weight of the evidence, which evidence is for you, the jury, to decide. *Commonwealth v. Mejia*, 463 Mass. 243, 256 (2012), citing *Commonwealth v. Casale*, 381 Mass. 167, 175-76 (1980).

## **11. Intent**

The Commonwealth must prove an individual's intent beyond a reasonable doubt. There are two types of intent, general and specific intent.

### **A. Specific Intent**

For a specific intent crime the Commonwealth must prove beyond a reasonable doubt that at the time of the offense the defendant intended the specific act. A person's intent is his or her purpose or objective. This requires you to make a decision about the defendant's state of mind at that time. It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often must decide from the actions of others what their state of mind is. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine what the defendant's intent was at that time. As a general rule, it is reasonable to infer that a person ordinarily intends the natural and probable consequences of any acts that she does intentionally. You may draw such an inference, unless there is evidence that convinces you otherwise. You should consider all the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt, as it must, that the defendant acted with the specific intent.

### **B. General Intent**

In determining whether the defendant acted "intentionally," you should give the word its ordinary meaning of acting voluntarily and deliberately, and not because of accident or negligence. It is not necessary that the defendant knew that she was

breaking the law, but it is necessary that he she intended the act to occur which constitutes the offense.

## 12. **Credibility of Witnesses**

Mass. Jury Instructions – Criminal No. 2-26

When, as in this case, evidence is presented to you in the form of testimony of witnesses, you must determine the credibility or believability of that evidence. You can believe everything a witness has said, only some of what a witness said, or you may choose not to believe any of a witness' testimony. Of course, when you disbelieve a witness, that is not evidence that something didn't happen, it merely means that you have to look elsewhere in the case for credible evidence on that point.

In deciding whether to believe a witness and how much importance to give to the testimony of a witness, you must look at all the evidence, drawing on your own common sense and experience in life. Often it is not only what a person says that may give you a clue as to whether they are being truthful, but how the witness says it.

In determining credibility, you may consider the witness' character, appearance and demeanor on the stand, whether the witness appears to be frank or not frank in testifying, whether the testimony seems reasonable or unreasonable, probable or improbable, whether the witness appears intelligent, and whether the witness' memory seems accurate. You should consider whether the witness -- any witness -- has a motive for testifying in a certain way, displayed a bias, or has interest in the outcome of the case. In particular, you may consider whether any witness said something or did something that demonstrates ill-will, prejudice or hostility toward the defendant.

The fact that a witness may have some interest in the outcome of this case does not mean that the witness is not trying to tell you the truth as that witness recalls it or believes it to be. But the witnesses' interest is a factor that you may consider along with all the other factors in determining credibility.



In determining credibility, remember sometimes people forget, or testify differently about the same things. In such a case, you must decide if the differences are due to innocent lapses of memory or the result of intentional falsehoods, and this may depend on whether they have to do with important facts or only minor details. *Commonwealth v. Daley*, 439 Mass. 558, 565 n.3 (2003).

### **13. Impeachment by Prior Conviction of a Crime**

See Mass. Jury Instructions – Criminal No. 2-18

You have heard evidence several witnesses were previously convicted of a crime. You may consider that information, along with any other pertinent information, in deciding whether or not to believe the witness's present testimony and how much weight, if any, to give it.

It is for you to say how much weight you should give a prior conviction in determining the witness's credibility. You might want to consider whether past crimes involving dishonesty are more relevant than past crimes that did not involve dishonesty, but it is up to you to decide how relevant you think any particular past conviction is to the witness's present truthfulness.

### **14. Prior Inconsistent Statements**

See Mass. Jury Instructions – Criminal No. 2-15

The testimony of a witness may be discredited or impeached by showing that he or she has previously made a statement which is inconsistent with his or her present testimony. The prior statement is admitted into evidence solely for your consideration in evaluating the credibility of the witness. Should you find the prior statement to be inconsistent, you may consider such statement only in connection with your evaluation of the credence to be given to the witness's present testimony in court. You may not consider the prior statement as establishing the truth of any fact contained in that prior

statement. *Commonwealth v. Simmonds*, 386 Mass. 234, 242 (1982); *Commonwealth v. West*, 312 Mass. 438, 440 (1942).

The testimony of a witness may be rehabilitated or supported by showing that he or she has previously made statements which are consistent with his or her present testimony. The prior statement is admitted into evidence solely for your consideration in evaluating the credibility of the witness. Should you find the prior statement to be consistent, you may consider such statement only in connection with your evaluation of the credence to be given to the witness's present testimony in court. You may not consider the prior statement as establishing the truth of any fact contained in that prior statement.

However, there are some exceptions to that. If the previous statement was adopted by the witness on the witness stand, you now have testimony in the courtroom admitted for all purposes; and if the prior statement was made a court hearing, specifically in this case, that includes grand jury testimony, and it's inconsistent, you may consider that for all purposes. So that is another tool you may look at in assessing credibility, but I wanted to draw that distinction because that type of testimony can be considered in both ways.

#### **15. Consciousness of Guilt**

You have heard evidence suggesting that the defendant:

- may have intentionally made certain false statements before and after her arrest

If the Commonwealth has proved that the defendant acted in this way, you may consider whether such actions indicate feelings of guilt by the defendant and whether, in turn, such feelings of guilt might tend to show actual guilt on these charges. You are not required to draw such inferences, and you should not do so unless they appear to be reasonable in light of all the circumstances of this case.

If you decide that such inferences are reasonable, it will be up to you to decide how much importance to give them. But you should always remember that there may be numerous reasons why an innocent person might do such things. Such conduct does not necessarily reflect feelings of guilt. Please also bear in mind that a person having feelings of guilt is not necessarily guilty in fact, for such feelings are sometimes found in innocent people. Finally, remember that, standing alone, such evidence is never enough by itself to convict a person of a crime. You may not find the defendant guilty on such evidence alone, but you may consider it in your deliberations, along with all the other evidence.

#### **16. Expert Testimony**

*See Mass. Jury Instructions – Criminal No. 2-24*

You have heard testimony in this case from witnesses qualified in certain professions and disciplines as expert witnesses. An expert witness is a person who, by reason of his or her education, training, and experience, has attained a level of expertise in a particular field, science, or profession. When called as a witness, that person may give his or her opinion and may testify to any matter about which that person is knowledgeable and which is relevant to the case. If the expert's assumptions involve disputed questions of fact which are material to the opinion reached by the expert, you should disregard that opinion of such expert unless you first find that the facts assumed by the expert in reaching his or her opinion were established by the party -- whether the Commonwealth or the defendant -- who is offering the expert's opinion.

As I instructed you earlier, you are the sole and exclusive judges of the facts. An expert witness cannot usurp your role as finders of the facts. He or she may assist you by providing certain information to help you better understand the testimony that you have heard and will have to weigh and consider in your deliberations. An expert witness

cannot determine issues of fact for you and the ultimate issue is for your determination and decision alone. *Commonwealth v. Richardson*, 423 Mass. 180, 185 (1996).

You should consider all of the factors I have just mentioned to you with respect to witnesses generally in determining the credibility of an expert witness and in determining the weight to be given his or her testimony. You may accept entirely the testimony of an expert witness, you may reject it entirely, or you may give it whatever weight you deem it to be entitled, be that weight great or small. You may consider the reasons the expert witness gave for his or her opinion and you may consider whether or not you find those reasons to be sound.

#### **17. Limiting Instruction Prior Bad Acts**

Evidence of prior crimes and bad acts cannot be considered as proof that an individual has a criminal personality or bad character. You have heard mention of other acts allegedly done by the defendant and others. You may not take that as a substitute for proof that the defendant committed the crimes charged. Nor may you consider it as proof that the defendant or others have a criminal personality or bad character.

But you may consider it solely on the limited issue of intent, state of mind, motive, pattern of conduct, absence of mistake or accident, and nature of the relationship between the defendant and William Brewer. You may not consider this evidence for any other purpose.

Specifically, you may not use it to conclude that if the defendant committed the other acts; she must also have committed these charges.

#### **18. Graphic Photographs**

See Mass. Jury Instructions – Criminal No. 2-27

The Commonwealth has introduced a certain photograph showing the alleged victim, Crystal Blanchard, after her death and you will have this photograph with you during your deliberations. This photograph, as you well know, is not pleasant, and in

fact could be said to be gruesome. I instruct you now that your verdicts must not in any way be influenced by the fact that this photograph may be gruesome.

The defendant is entitled to a verdict based solely on the evidence, and not one based on pity for the alleged victim, which might be occasioned by the photographs. View those exhibits only as they draw attention to a clinical medical status or to the nature and extent of the alleged victim's injuries. *Commonwealth v. Cardarelli*, 433 Mass. 427, 430-32 (2001) and cases cited; Mass. Jury Instructions – Criminal No. 2-27.

### **ELEMENTS OF THE CRIMES**

#### **19. Murder in the Second Degree<sup>2</sup> (Indictment 01)**

Murder is the unlawful killing of a human being. The Commonwealth alleges the defendant committed murder in the second degree. The Commonwealth alleges murder in the second degree on the following theories: plain and strong likelihood of death and felony murder. You are to consider each of these two theories, and may find the defendant not guilty, or guilty on one or both of these theories.

Your verdict must be unanimous, whether it be "not guilty" or "guilty" of one or more theories of murder. To find the defendant guilty on any of these theories of murder you must be unanimous, that is, all the deliberating jurors must agree that the Commonwealth has met its burden of proving every required element of that theory beyond a reasonable doubt.

#### **A. Murder in the Second Degree**

I will first define the elements of murder in the second degree. In order to prove murder in the second degree, the Commonwealth must prove the following elements:

1. The defendant caused the death of Crystal Blanchard; and

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<sup>2</sup> The instructions on murder have been taken from the Supreme Judicial Court's Model Jury Instruction on Homicide (March 2013). Where the Commonwealth has supplemented the model instructions with additional statements of law that have been approved by appellate courts, the Commonwealth has indicated the additional language and provided case citations for the propositions.

2. That is the defendant intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

**(1) Causation:** The first element is that the defendant caused the death of Crystal Blanchard. A defendant's act is the cause of the victim's death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.

In order for you to find that the defendant killed Crystal Blanchard, the prosecution must prove beyond a reasonable doubt that the injuries suffered by Ms. Blanchard on December 24, 2010, were the proximate cause of her death. Proximate cause is a cause which in the natural and continuing sequence of events produces the death, and without which, the death would not have occurred. There may be more than one proximate cause of death. Under the law, the defendant's conduct need not have been the only cause of death. It is not necessary that it be the sole cause of death. If the defendant sets into motion the events from which death follows as a consequence of the defendant's actions, the defendant's conduct caused her death in the law, even if other causes cooperated in producing the death. So, as I said, it need not be the sole cause.

**(2) Intent to Kill:** The second element is that the defendant acted with malice:

a. intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

To analyze this prong you must first determine whether the defendant intended to perform the act that caused the victim's death. If you find that she intended to perform the act, you must then determine what the defendant herself actually knew about the relevant circumstances at the time she acted. Then you must determine

whether, under the circumstances known to the defendant, a reasonable person would have known that the act intended by the defendant created a plain and strong likelihood that death would result. As I described above there are two forms of intent, specific and general. This form of malice requires general rather than specific intent. *See Commonwealth v. Blake*, 409 Mass. 146 (1991); *Commonwealth v. Grey*, 399 Mass. 469, 472 n.4 (1987). In determining whether the defendant acted "intentionally," you should give the word its ordinary meaning of acting voluntarily and deliberately, and not because of accident or negligence. It is not necessary that the defendant knew that he she was breaking the law, but it is necessary that he she intended the act to occur which constitutes the offense.

**B. Felony Murder in the Second Degree**

Next, I will define the elements of felony-murder in the second degree. A defendant is guilty of felony-murder in the second degree if the Commonwealth has proved beyond a reasonable doubt that the victim was killed during the defendant's commission or attempted commission of a felony with a maximum sentence of less than life imprisonment. To prove the defendant guilty of felony-murder in the second degree, the Commonwealth must prove the following elements beyond a reasonable doubt:

- (1) The defendant committed a felony with a maximum sentence of less than imprisonment for life;
- (2) The death occurred during the commission or attempted commission of the underlying felony; and
- (3) The defendant acted with a conscious disregard for the risk to human life.

I will explain each element in more detail.

**(1) Non-Life Felony:** First, the Commonwealth must prove that the defendant committed a felony with a maximum sentence of less than imprisonment for life. The Commonwealth alleges that the defendant committed arson (indictment

number 03). I instruct you this crime is a felony with a maximum sentence of less than life imprisonment.

In order for you to decide whether arson occurred in this case, I must instruct you on all elements of this offense.

Arson occurs when the defendant wilfully and maliciously sets fire to, burns, or causes to be burned, or whoever aids, counsels or procures the burning of, a dwelling house. Arson is a specific intent crime. A specific intent is "a conscious act with the determination of the mind to do an act. It is contemplation rather than reflection and it must precede the act."<sup>3</sup> The Commonwealth alleges this underlying felony in a separate indictment, and I will instruct you in just a moment on the elements that must be proven beyond a reasonable doubt.<sup>4</sup>

**(2) During the Commission of the Felony:** The second element is that the killing occurred during the commission or attempted commission of the underlying felony. The Commonwealth must prove beyond a reasonable doubt that the killing occurred in connection with the felony and at substantially the same time and place. A killing may be deemed to be connected with the felony if the killing occurred as part of the defendant's effort to escape responsibility for the felony.

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<sup>3</sup> *Commonwealth v. Murray*, 51 Mass. App. Ct. 57, 62 n. 10 (2001).

<sup>4</sup> The Commonwealth does not request, and the court should not give a Merger Instruction where arson does not have an assaultive element. See SJC Homicide Instructions Felony Murder in the Second Degree. The Felony Murder Rule relieves the prosecution of proving malice, therefore the "substitute intent derived from the felony should be clearly distinct from malice." See *Commonwealth v. Wade*, 428 Mass. 147, 152 (1998). Here, it is the intent to do that conduct (willfully and maliciously set fire to, burn, or caused a dwelling to burn) that serves as the substitute for malice. See *Commonwealth v. Christian*, 430 Mass. 552, 556-557 (2000). It is not an act of violence against a person, it is a property crime. Therefore any proposed Merger Instruction is inapplicable.



**(3) Inherently Dangerous/Conscious Disregard:** The third element is that the underlying felony was inherently dangerous or defendant acted with a conscious disregard for the risk to human life. You must determine in the circumstances of this case whether the defendant committed arson. I instruct you as a matter of law the crime of arson is inherently dangerous to human life.<sup>5</sup> You may also find that the defendant committed this felony with a conscious disregard for the risk to human life if you find that the defendant intended the felony to occur or the felony did occur in a way known by the defendant to be dangerous to life or likely to cause death.

## 20. **Involuntary Manslaughter**

Wanton and reckless conduct is intentional conduct that created a high degree of likelihood that substantial harm will result to another person. Wanton and reckless conduct usually involves an affirmative act. An omission or failure to act may constitute wanton and reckless conduct where the defendant has a duty to act.

### A. **Intentional Act**

Involuntary manslaughter is an unlawful killing unintentionally caused by wanton and reckless conduct. Wanton and reckless conduct is intentional conduct that created a high degree of likelihood that substantial harm will result to another person. Wanton and reckless conduct is intentional conduct that created a high degree of likelihood that substantial harm will result to another person. Wanton and reckless conduct usually involves an affirmative act. An omission or failure to act may constitute wanton and reckless conduct where the defendant has a duty to act.

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<sup>5</sup> The Massachusetts Supreme Judicial Court has long recognized arson as an inherently dangerous felony. See *Commonwealth v. Matchett*, 386 Mass. 492, 505 n.15 (1982); *Commonwealth v. Bell*, 460 Mass. 294, 308 (2011). See also *Commonwealth v. Mello*, 420 Mass. 375, 391 (1995) ("The defendant was not entitled to an instruction on conscious disregard because the underlying felony, arson, is inherently dangerous to human life.").

To prove that the defendant is guilty of involuntary manslaughter because of wanton and reckless conduct, the Commonwealth must prove the following elements beyond a reasonable doubt:

- (1) The defendant caused the victim's death;
- (2) The defendant intended the conduct that caused the victim's death; and
- (3) The defendant's conduct was wanton and reckless.

I will now discuss each element in more detail.

**(1) Causation:** The first element is that the defendant caused the death of Crystal Blanchard. A defendant's act is the cause of Crystal Blanchard's death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.

In order for you to find that the defendant killed Crystal Blanchard, the prosecution must prove beyond a reasonable doubt that the injuries suffered by Ms. Blanchard on December 24, 2010 were the proximate cause of her death. Proximate cause is a cause which in the natural and continuing sequence of events produces the death, and without which, the death would not have occurred. There may be more than one proximate cause of death. Under the law, the defendant's conduct need not have been the only cause of death. It is not necessary that it be the sole cause of death. If the defendant sets into motion the events from which death follows as a consequence of the defendant's actions, the defendant's conduct caused his death in the law, even if other causes cooperated in producing the death. So, as I said, it need not be the sole cause.

**(2) Intentional Conduct:** The second element is that the defendant intended the conduct that caused the death. The Commonwealth is not required to prove that the defendant intended to cause the death.

**(3) Wanton and Reckless:** The third element is that the defendant's conduct was wanton and reckless. Wanton and reckless conduct is conduct that creates

a high degree of likelihood that substantial harm will result to another. It is conduct involving a grave risk of harm to another that a person undertakes with indifference to or disregard of the consequences of such conduct. Whether conduct is wanton and reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew. If the defendant realized the grave risk created by his conduct, his subsequent act amounts to wanton and reckless conduct whether or not a reasonable person would have realized the risk of grave danger. Even if the defendant himself did not realize the grave risk of harm to another, the act would constitute wanton and reckless conduct if a reasonable person, knowing what the defendant knew, would have realized the act posed a risk of grave danger to another.

It is not enough for the Commonwealth to prove the defendant acted negligently, that is, in a manner that a reasonably careful person would not have acted. The Commonwealth must prove that the defendant's actions went beyond negligence and amounted to wanton and reckless conduct as I have defined that term.

#### **B. Failure to Act**

An intentional omission or failure to act that creates a high degree of likelihood that substantial harm will result to another may constitute involuntary manslaughter where the defendant has a duty to act. Such a duty may arise out of a special relationship. A duty may also arise where a person creates a situation that poses a grave risk of death or serious injury to another. When such a duty is owed, a failure to act that creates a high degree of likelihood that substantial harm will result to another is wanton and reckless. To prove that the defendant is guilty of involuntary manslaughter by reason of a wanton and reckless failure to act, the Commonwealth must prove beyond a reasonable doubt the following elements:

1. There was a special relationship between the defendant and the victim that gave rise to a duty of care, or the defendant created a situation that posed a grave risk of death or serious injury to another;

2. The defendant's failure to act caused the victim's death;<sup>6</sup>
3. The defendant intentionally failed to act;
4. The defendant's failure to act was wanton and reckless.

I will now discuss each element in more detail.

The first element is whether the defendant created a situation that posed a grave risk of death or serious injury to another giving rise to a duty of care.

The second element is that the defendant's failure to act caused the death of Crystal Blanchard. A defendant's failure to act is the cause of Crystal Blanchard's death where the failure to act, in a natural and continuous sequence, results in death, and without which death would not have occurred.

The third element is that the defendant intentionally failed to act. The Commonwealth is not required to prove that the defendant intended to cause the death. The fourth element is that the defendant's failure to act was wanton and reckless. A failure to act is wanton and reckless where there is a duty to prevent probable harm to another, and the defendant could have taken reasonable steps to minimize the risk to the person to whom the duty is owed. A failure to act that is wanton and reckless involves a high degree of likelihood that substantial harm will result to the person to whom the duty is owed. It is a failure to act that amounts to indifference to or disregard of the consequences to the person to whom the duty is owed. Whether the defendant's failure to act was wanton and reckless depends on the circumstances and the steps that a person could reasonably be expected to take to minimize the risk to the person to whom the duty is owed. Wanton and reckless conduct depends either on what the defendant knew, or how a reasonable person would have acted knowing what the

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<sup>6</sup> *Commonwealth v. Levesque*, 436 Mass. 443, 449 (2002) (evidence presented to grand jury sufficient to support indictment for involuntary manslaughter where defendant negligently started fire and intentionally failed to report fire causing death of firefighters).

defendant knew. If the defendant realized the grave danger and could have taken reasonable steps to minimize the risk, his subsequent failure to act is wanton and reckless whether or not a reasonable person would have realized the risk of grave danger. Even if the defendant herself did not realize the grave danger of harm to another, her failure to act would be wanton and reckless if a reasonable person in like circumstances would have realized the grave danger and taken steps to minimize the risk.

It is not enough for the Commonwealth to prove the defendant was negligent in failing to act, that is, that a reasonably careful person would have acted. The Commonwealth must prove that the defendant's failure to act went beyond negligence, and was wanton and reckless as I have defined that term.

**21. Assault and Battery with a Dangerous Weapon Causing Serious Bodily Injury (Indictment 02)**

The defendant is also charged with having committed an assault and battery by reckless conduct, with a dangerous weapon, upon Paul Pitts, thereby causing serious bodily injury to Paul Pitts. In order to prove the defendant guilty of having committed this offense, the Commonwealth must prove three things beyond a reasonable doubt:

1. That the defendant acted recklessly;
2. That the defendant's reckless conduct included an intentional act which resulted in serious bodily injury to Paul Pitts;
3. That the injury was inflicted by a dangerous weapon.

First, the Commonwealth must prove the defendant acted recklessly. It is not enough that the defendant acted negligently — that is, in a manner that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if she knew, or should have known, that such actions were very likely to cause substantial harm to someone, but she ran that risk and went ahead anyway. The defendant must

have intended her acts which resulted in the touching, in the sense that those acts did not happen accidentally. But it is not necessary that she intended to injure or strike Paul Pitts, or that she foresaw the harm that resulted. If the defendant actually realized in advance that her conduct was very likely to cause substantial harm and decided to run that risk, such conduct would of course be reckless. But even if she was not conscious of the serious danger that was inherent in such conduct, it is still reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that it was very likely that they would result in substantial injury.

Second, the Commonwealth must prove the conduct caused serious bodily injury to Paul Pitts. The defendant's act is the cause of Paul Pitt's injury where the act, in a natural and continuous sequence, results in injury, and without which injury would not have occurred. There may be more than one proximate cause of the injury. Under the law, the defendant's conduct need not have been the only cause of injury. It is not necessary that it be the sole cause of injury. If the defendant sets into motion the events from which injury follows as a consequence of the defendant's actions, the defendant's conduct caused his injury in the law, even if other causes cooperated in producing injury. So, as I said, it need not be the sole cause.

For the purposes of this section "serious bodily injury" shall mean bodily injury which results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

Third, the Commonwealth must prove the injury was inflicted by a dangerous weapon. Here, the alleged dangerous weapon is smoke and fire. An item that is normally used for innocent purposes can become a dangerous weapon if it is intentionally used as a weapon in a dangerous or potentially dangerous fashion. The law considers any item to be a dangerous weapon if it is intentionally used in a way that it reasonably appears to be capable of causing serious injury or death to another person.

For example, a pencil could be a dangerous weapon if it is aimed at someone's eyes. In deciding whether an item was intentionally used as a dangerous weapon, you may consider the circumstances surrounding the alleged crime, the nature, size and shape of the item, and the manner in which it was handled or controlled.

## **22. Arson of a Dwelling House (Indictment 03)**

In order to prove arson the Commonwealth must prove the following elements beyond a reasonable doubt:

- (1) The defendant set fire to, burned, or caused a building to burn;
- (2) The building was a dwelling house, a building adjoining to or adjacent to a dwelling house, or a building whose burning resulted in a dwelling house being burned,
- (3) The defendant acted willfully and maliciously.

The first element the Commonwealth must prove beyond a reasonable doubt is the defendant set fire to, burned, or caused to be burned the building in question. This requires that some portion of the building must actually have been on fire and burned. There is, however, no requirement that the building be consumed by fire or destroyed. Even charring is sufficient evidence of burning.

The second element the Commonwealth must prove beyond a reasonable doubt is that the building burned was a dwelling house, a building adjoining or adjacent to a dwelling house, or any building the burning of which resulted in a dwelling house being burned. The phrase "dwelling house" means and includes all buildings used as dwellings, whether as apartment houses, tenement houses, hotels, boarding houses, dormitories, hospitals, institutions, sanatoria or other buildings where people live or reside. It is not necessary that the building be occupied at the time of the burning, but the Commonwealth must prove that the building is capable of being occupied as a dwelling, is adjoining or adjacent to a dwelling house or is a building the burning of which

resulted in a dwelling house being burned. Further it does not matter if the defendant owned the dwelling or if it was owned by another.

The third element the Commonwealth must prove beyond a reasonable doubt is that the defendant willfully and maliciously set fire to or caused the building to be burned.

Arson is a specific intent crime. For a specific intent crime the Commonwealth must prove beyond a reasonable doubt that at the time of the offense the defendant intended the specific act. A person's intent is his or her purpose or objective. This requires you to make a decision about the defendant's state of mind at that time. It is obviously impossible to look directly into a person's mind. But in our everyday affairs, we often must decide from the actions of others what their state of mind is. In this case, you may examine the defendant's actions and words, and all of the surrounding circumstances, to help you determine what the defendant's intent was at that time. As a general rule, it is reasonable to infer that a person ordinarily intends the natural and probable consequences of any acts that he does intentionally. You may draw such an inference, unless there is evidence that convinces you otherwise. You should consider all the evidence, and any reasonable inferences you draw from the evidence, in determining whether the Commonwealth has proved beyond a reasonable doubt, as it must, that the defendant acted with the specific intent to willfully and maliciously set fire to or cause to be burned a dwelling.

Willfulness and malice are required to constitute the state of mind necessary to commit arson. The word willfully means that the act was intentionally and by design rather than an act that is thoughtless or accidental. A person acting willfully intends both his or her conduct and it results in harm. This requirement of willfulness means that accidentally or negligently caused burnings are not arson. The Commonwealth must also prove beyond a reasonable doubt that the defendant acted maliciously or with malice. The terms "malice" or "maliciously" have different meanings under this statute than the



ordinary definition of the terms. Malice in the context of this arson instruction characterizes all acts done with an evil disposition, with a wrong and unlawful motive or purpose, or the willful doing of an injurious act without lawful excuse. A burning is malicious if it is done with any wrongful or unlawful motive or purpose and without lawful excuse. Malice may be inferred from the wilful act of setting the fire or causing the fire to be set.<sup>7</sup> The Commonwealth bears the burden of proving each element of the crime beyond a reasonable doubt.

### 23. **Injury to Firefighter (Indictments 04 & 05)**

The defendant is also charged with causing injury to a firefighter during the performance of his duty. In order to prove the defendant guilty of this crime the commonwealth must prove the following elements beyond a reasonable doubt:

- (1) That the defendant committed the crime of arson; and
- (2) it resulted in injury to a firefighter in the performance of his duty.

First, the Commonwealth must prove the defendant committed the act of arson. Arson described above, is proven where the defendant willfully and maliciously set fire to, burned, or caused a building to burn a dwelling house.

Second, the Commonwealth must prove that the arson resulted in injury to the firefighter in performance of his duty. The injury must be sufficiently serious to interfere with the alleged victim's health or comfort. It need not be permanent, but it must be more than trifling. For example, an act that only shakes up a person or causes only momentary discomfort would not be sufficient.

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<sup>7</sup> See *Commonwealth v. Niziolek*, 380 Mass. 513, 527 (1980); See *Commonwealth v. Blake*, 409 Mass. 146, 154 (1991) ("Malice is a necessary element of the crime of arson. It doesn't need to be overtly expressed, it may be inferred from the willful act of burning without legal justification" (emphasis added)."

## 24. Motive

The Commonwealth does not have to prove that the defendant had any particular motive for the killing. In other words, motive is not one of the elements the Commonwealth must prove for you to find the defendant guilty of murder. However, you may consider any evidence you have heard relative to a particular motive for the killing in considering whether the Commonwealth has proven the defendant's guilt.

## 25. Jurors' Obligation on Guilt or Innocence

*See Model Jury Instructions on Homicide, Supplemental Instruction E*

If the evidence convinces you beyond a reasonable doubt that the defendant is guilty of a criminal offense, you have a duty to find the defendant guilty of the most serious offense that the Commonwealth has proved beyond a reasonable doubt. If the evidence does not prove beyond a reasonable doubt that the defendant is guilty of any offense charged, you must find him not guilty.

### **MISCELLANEOUS**

## 26. Unanimous Verdict

In order to return a verdict on any one of these indictments against the defendant, each juror must agree; that is, the verdict must be unanimous.

What that means is that on these indictments the jury does not have a verdict unless and until all twelve deliberating jurors agree. You do not have a guilty verdict unless all twelve agree that it is guilty, of whatever particular crime it may be and under which particular theory or theories. You do not have a not guilty verdict unless all twelve agree that it is not guilty.

## 27. Consequences of Verdicts

The jury's decision should be based solely on the evidence and the law in this case, and without regard to the possible consequences of the verdicts. Sentencing may not be considered by you, the jury, in reaching your verdicts.

## 28. **Jury Deliberations**

Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement if it can be done without violence to individual judgment. Each juror must decide the case for himself or herself, but only after an impartial consideration of the evidence with his or her fellow jurors.

In the course of deliberations, a juror should not hesitate to re-examine his or her own opinions, and change his or her opinion if convinced it is erroneous. However, no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of his or her fellow jurors or for the mere purpose of returning a verdict.

Further, you are instructed that no juror is better qualified to determine the truth of the facts in controversy or to deliberate upon a verdict solely because of his or her occupation or reputation.

## 29. **Communication With The Court**

If it becomes necessary during your deliberations to communicate with the Court you may send a note by a court officer, signed by your foreperson. No member of this jury should ever attempt to communicate with the Court by any means other than a signed writing and the Court will never communicate with any member of the jury on any subject touching the merits of this case otherwise than in writing or orally here on open court.

You will note shortly from the oath taken by the court officers that they too, as well as all other persons, are forbidden to communicate in any way or manner with any member of this jury on any subject touching the merits of this case.

Bear in mind also that you are never to reveal to any person, not even to the Court, how the jury stands numerically or otherwise on the questions before you until such time as you have reached a unanimous verdict.

### 30. **Role of the Foreperson**

It is necessary that there be a person in charge of jury panel during deliberations. There are no specific rules or guidelines as to how the jury should conduct its deliberations inside the jury room. Nevertheless, a foreperson's function is not unlike that of the chairman of a meeting. It is helpful to have someone directing the discussion and deliberations and making sure that everyone who wants to be heard has an opportunity to do so. If the discussions or deliberations get "off track" and away from business at hand, it is helpful to have the foreperson redirect the attention of the deliberating panel to the issue at hand.

One of the most important functions of the foreperson is the taking of the vote on the final verdict. The decision of the panel must be unanimous and the foreperson should be certain that each member of the panel agrees in his or her entirety to the verdict.

The foreperson will have in his custody the verdict slips, with a copy of the corresponding indictment attached to each verdict slip for each defendant. After final vote of the panel, the foreperson should check the appropriate box of either "guilty" -- and of what crime or crimes and under which particular theory or theories -- or "not guilty," and then sign and date the form.

### 31. **Selection and Conduct of Alternates**

The panel of fifteen jurors will soon be reduced to twelve for deliberation. The three alternates are chosen at random and kept apart from the deliberating jury during deliberations. The alternates will have a difficult task, as they cannot discuss the case or conduct any deliberations on their own. It is necessary to have alternates standing by in the event that a member of the deliberating jury becomes ill or has to respond to a major family crisis.

When a member of a deliberating panel is excused and released, an alternate is chose to replace that person on the panel. The deliberating jury is then required to go

back to the beginning phases of deliberation, as the reconstituted panel would indeed be a new jury panel for deliberation. Therefore, it is important that the alternates do not deliberate or discuss the case between themselves, for if an alternate becomes a member for deliberation, the view of that alternate should be his or her own to contribute towards deliberation and not the assimilated product of a discussion among the alternates.

As all of you jurors have been very patient and conscientious throughout this trial, being chosen as an alternate has to be a disappointment in that four members will not be able to join with their fellow jurors in reaching the verdict. Nevertheless, it is a necessary and important function that alternates perform at the conclusion of the trial.

In sum, pursuant to Mass. R. Crim. P. 24(b), the Commonwealth respectfully requests this Honorable Court to include the foregoing instructions within its charge to the jury.

Respectfully Submitted  
For the Commonwealth,

DANIEL F. CONLEY  
DISTRICT ATTORNEY

By:

\_\_\_\_\_  
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Dated: February 5, 2016

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss:

SUPERIOR COURT DEPT.  
NO. SUCR-2011-10211

COMMONWEALTH

V.

MELISSA PFEIFFER

**DEFENDANT'S REQUESTED INSTRUCTIONS**

Melissa Pfeiffer, defendant, by counsel, respectfully moves this honorable Court that the jurors be provided with the following instructions. Instructions requested below are adopted from the Model Instructions for Trials in Superior Court or the most recent Model Instructions on Homicide Offenses. The original section headings are left in place for ease of reference. Where a substantive change is suggested it is presented in **bold** type:

General Considerations**§ 1.2 Presumption Of Innocence**

The defendant in this case, as in any criminal case, is presumed to be innocent. The jury must bear in mind that the law never imposes on a defendant in a criminal case the burden or duty of calling any witness or indeed of presenting any evidence whatsoever. This legal presumption of the defendant's innocence is not an idle theory to be discarded or disposed of by the jury by caprice, passion or prejudice. Furthermore, the defendant is not to be found guilty on any of these indictments on suspicion or conjecture, but only on evidence produced and admitted before this jury in this courtroom. The fact that the defendant may have been arrested, held in custody or complained against is not to be regarded as a circumstance tending to incriminate the defendant or creating any unfavorable impression against him or her. An indictment is not evidence. The indictment is nothing more than a piece of paper we use in our system to bring the defendant before the court and inform the defendant of the charges that have been made against him or her. The fact that there may have been a prior hearing, such as grand jury proceedings, does not change or alter in the least that presumption of innocence. You are not to draw any adverse inferences from the fact that there may have been such a hearing, nor are you to speculate as to the result of any such hearing. The defendant is presumed to be innocent until and unless you the jury decide unanimously that the Commonwealth has proved the defendant guilty of each and every element of each

charged offense beyond a reasonable doubt.

In this case, as in every criminal case, the burden of proof is on the Commonwealth. The Commonwealth has the burden throughout the entire trial. The Ms. Pfeiffer never has any burden to prove her innocence or produce evidence. There is no duty resting on the defendant to prove or otherwise establish her innocence.

The Commonwealth must prove each and every element of every offense charged beyond a reasonable doubt. If, from the evidence introduced before you, you members of the jury entertain a reasonable doubt as to whether or not the defendant committed the crime(s) with which he or she is charged, then you must find the defendant not guilty.

### **§ 1.3 Evidence: Direct And Circumstantial**

In the trial of this or any other case, there are two kinds of evidence: direct and circumstantial evidence.

Direct evidence is proof of a fact, such as the testimony of an eyewitness, that is, someone who comes into the courtroom to tell you what he or she heard, saw or felt. Generally, such testimony is based on the witness's five senses.

Circumstantial evidence is proof of a chain of circumstances from which you may infer or conclude that a fact exists even though it has not been proven directly.

You are entitled to consider both kinds of evidence. There is no difference at all in the probative value between direct and circumstantial evidence. Circumstantial evidence is competent to establish guilt beyond a reasonable doubt.

Whether the evidence is direct or circumstantial, the Commonwealth must prove the defendant guilty beyond a reasonable doubt from all of the evidence in the case. Where the Commonwealth's case is based solely on circumstantial evidence, and that is for you to say, you may find the defendant guilty only if those circumstances are conclusive enough to leave you with a moral certainty—a clear and settled belief that the defendant is guilty and that there is no other reasonable explanation of the facts as proven.

### **§ 1.4 Inferences**

An inference is a permissible deduction that you may make from evidence that you have accepted as believable. Inferences are things you do every day; little steps in reasoning in which you take some known information, apply your experience in life to it, and then draw a conclusion.

You may draw an inference even if it is not necessary or inescapable, so long as it is reasonable and warranted by the evidence, but you may not indulge in conjecture or guesswork in drawing inferences. In order to convict the defendant, you must find that all of the evidence and the reasonable inferences that you have drawn, taken together, prove that (he/she) is guilty beyond a reasonable doubt. If it does not, you must acquit (him/her).

### **§ 1.5 Role Of Judge And Fact-Finding Role Of Jury**

My responsibility as the judge is to give you all the law that you need to know in order to solve or resolve the issues placed before you on this jury. You must take the law as I give it to you. You have no option whatsoever in that regard.

You as jurors are the sole factfinders in this case. Many of you have had life experiences that may have touched on similar type matters as have appeared in this case. Perhaps some of you over the years have read novels concerning this type of thing and this type of case, or

have seen television programs, or a variety of other sources. Sometimes jurors, by exposing themselves to a variety of things during the course of their lives, develop ideas about what they would like the law to be or develop ideas in their own mind about what the law is. You do not have that option. You must take the law as I give it to you and apply that law, and that law alone, to the facts as you and you alone collectively find those facts to be.

Your memory of the evidence must control, not the memory of the lawyers, not my memory, but your collective memories must determine the evidence here in this case. If I refer to some piece of evidence during the course of my instructions to you, it will be for the purpose of example and for the purpose of example only. Please do not accord that evidence any greater weight merely because I make reference to it. Give it no additional weight at all.

You must therefore consider all of the evidence you have heard during the course of this trial calmly, dispassionately and without sympathy. You are in search of a verdict, the word verdict extending from two Latin words, *dictum veritas*, meaning, “to speak the truth.” We have a shared responsibility in this case, as in all cases.

You are the sole judge of the facts in this case, and I am the sole judge of the law. You decide the facts, and of course, you must make your determinations in this case based on the law as I give it to you concerning the facts as you find those facts to be.

### § 1.1.2 Webster Charge (Modern Syntax)

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant is guilty of the charge(s) made against her.

What is proof beyond a reasonable doubt? The term is often used and probably pretty well understood, though it is not easily defined. Proof beyond a reasonable doubt does not mean proof beyond all possible doubt, for everything in the lives of human beings is open to some possible or imaginary doubt. A charge is proved beyond a reasonable doubt if, after you have compared and considered all of the evidence, you have in your minds an abiding conviction, to a moral certainty, that the charge is true.

I have told you that every person is presumed to be innocent until he or she is proved guilty, and that the burden of proof is on the Commonwealth. If you evaluate all the evidence and you still have a reasonable doubt remaining, the defendant is entitled to the benefit of that doubt and must be acquitted.

It is not enough for the Commonwealth to establish a probability, even a strong probability, that the defendant is more likely to be guilty than not guilty. That is not enough. Instead, the evidence must convince you of the defendant's guilt to a reasonable and moral certainty; a certainty that convinces your understanding and satisfies your reason and judgment as jurors who are sworn to act conscientiously on the evidence.

This is what we mean by proof beyond a reasonable doubt.

### § 1.5.2 Supplemental Instruction: Judge's Rulings/Comments/Demeanor/Conduct During Trial

You should not consider anything I have said or done during the trial, in ruling on motions



or objections, or in my comments to the attorneys, or in questions to witnesses, or in setting forth the law in these instructions, as any indication of my opinion as to how you should decide the defendant's guilt or innocence. If you believe that I have expressed or hinted at any opinion about the facts of this case, please disregard it. I have no opinion about the facts or what your verdict should be. That is solely and exclusively your duty and responsibility.

You are to confine your deliberations to the evidence and nothing but the evidence in this case.

### **§ 1.5.3 Supplemental Instruction: No Independent Research**

You are to confine your deliberations to the evidence and nothing but the evidence. You are not to consult with any person about any aspect of this case by any means of communication, including by telephone, text messages, email, Internet chat or blogs, or social networking websites. You are not to read, watch, or listen to any account of any aspect of this case in any news media or from any other source. You are not to read, research, solicit, or otherwise access information relating to any aspect of this case from any outside source, including any Internet website, or any other electronic communication source.

### **§ 1.6 Role Of The Attorney**

During the course of this trial, attorneys on either side may have had occasion to object, to make a motion to strike, or to request a side bench conference. The rules of evidence are very strict and demanding. When attorneys on either side of the case feel, in their professional opinion, that a question or answer violates a rule of evidence, they have a professional responsibility in properly representing their respective client to interpose an objection, and it then becomes my responsibility to rule on that objection. Rules of evidence are structured in such a way as to ensure that the only evidence the jury hears is relevant and material to some issue involved in the case; evidence that falls outside of those parameters is inappropriate and subject to an objection.

If I sustain an objection to a question, please draw no inference whatsoever from the content of the question itself. That question has no value whatsoever and you are to disregard it. If I strike an answer, it is as though that answer was never given, and it must play no part whatsoever in your deliberations.

### **§ 1.7 Opening Statements And Closing Arguments**

While important parts of the case, the opening statements and closing arguments are not evidence in the case. The only evidence in the case comes from the testimony of the witnesses that appeared before you and the exhibits that have been introduced into evidence. You are not to consider anything you heard in the opening statements or closing statements as evidence unless it materialized before you from the witness stand or through exhibits during the course of this trial. If a lawyer made reference to evidence that he or she said was produced during the course of this trial, and according to this jury that evidence was not produced, then you must summarily reject that statement of the lawyer. If a lawyer made reference to a personal belief or a personal position on the evidence in this case, you must summarily reject that opinion as well. The personal beliefs of the lawyer are not relevant. The case is to be decided on the findings of fact made by this jury based on evidence heard

from that witness stand and/or from exhibits introduced during the course of this trial.

### § 1.8 Credibility Of Witnesses

During the course of this trial, you have heard witnesses from a variety of walks of life testify. With reference to any and all witnesses who have testified before this jury, you have wide latitude. As a jury, you can believe every single word that a witness says on that witness stand or you can disbelieve every single word that a witness says from that witness stand. You may decide to accept part of a witness's testimony and reject other parts of his or her testimony. That is for you and you alone to decide.

In evaluating the credibility of a witness, you may use various tools. You may consider the ability, the opportunity and the reliability of a witness to see or hear something in the past and then remember and later testify before this jury in this courtroom. You may consider the appearance of a witness while testifying before you, the conduct of the witness, the manner of testifying before this jury, any inconsistency that you may have found in a witness's testimony, any interest a witness may have in the outcome of these proceedings, any bias or prejudice or hostility that may have been demonstrated by the witness while testifying before you, the level of accuracy of a witness testifying before you, and the reliability of the testimony as it developed before you, the members of the jury.

#### Mental Health Issues

### § 2.2 Criminal Responsibility

[Note to Judge: Where there is evidence of lack of criminal responsibility, this instruction, at the discretion of the judge, may be given as a stand-alone instruction prior to the murder instruction or inserted within the murder instruction. In deciding when to give this instruction, a judge may wish to consider whether the defendant has conceded that he committed the crime and whether the only live issue for the jury to decide is the defendant's criminal responsibility.]

To prove the defendant guilty of any crime, the Commonwealth must prove beyond a reasonable doubt that the defendant was criminally responsible at the time the alleged crime was committed. The burden is not on the defendant to prove a lack of criminal responsibility. Under the law, the Commonwealth bears the burden of proving beyond a reasonable doubt that the defendant committed the crime with which he is charged and also that the defendant is criminally responsible for his conduct.

Criminal responsibility is a legal term. A person is not criminally responsible for his conduct if he has a mental disease or defect, and, as a result of that mental disease or defect, lacks substantial capacity either to appreciate the criminality or wrongfulness of his conduct or to conform his conduct to the requirements of the law.

The phrase “mental disease or defect” is a legal term, not a medical term; it need not fit into a formal medical diagnosis. The phrase “mental disease or defect” does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

It is for you to determine in light of all the evidence whether the defendant had a mental

disease or defect. If the Commonwealth has proved to you beyond a reasonable doubt that the defendant was not suffering from a mental disease or defect at the time of the killing, the Commonwealth has satisfied its burden of proving that the defendant was criminally responsible.

If you have a reasonable doubt whether the defendant had a mental disease or defect at the time of the killing, then you must determine whether the defendant had a mental defect, he lacked substantial capacity either to appreciate the nature of his conduct or to conform his conduct to the requirements of the law. The Commonwealth must prove beyond a reasonable doubt that the defendant had substantial capacity to conform his conduct to the requirements of the law that may have existed did not deprive the defendant of a meaningful understanding of the legal or moral significance of his conduct. The defendant must have been able to realize, in some meaningful way, that his conduct was illegal or wrong.

The word "appreciate" means to understand rather than to know. It means the legal significance of conduct; "wrongful" means the legal significance of conduct. The Commonwealth must prove that the defendant was illegal or that it was wrong. It is not enough for the defendant merely knew or was intellectually aware that his conduct was illegal or wrong; rather, the Commonwealth must prove beyond a reasonable doubt that the defendant's mental disease or defect did not deprive the defendant of a meaningful understanding of the legal or moral significance of his conduct. The defendant must have been able to realize, in some meaningful way, that his conduct was illegal or wrong.

In considering whether the Commonwealth has met its burden of proof, you may consider all the evidence that has been presented at this trial. You may consider the facts underlying the crime and evidence of the defendant's actions before and after the crime. You may consider the opinions of any experts who testified, and give those opinions whatever weight you think they deserve.

## § 5.2 Mental Impairments As They Apply To Proof Of Knowledge Or Intent ("Diminished Capacity")

**Even if you find beyond a reasonable doubt that the defendant was criminally responsible any evidence of mental impairment can be considered.**

Whenever the defendant's knowledge or intent must be proved, the defendant's culpability rests upon proof of such knowledge or intent. The Commonwealth must prove the requisite knowledge or intent beyond a reasonable doubt in order to prove that the defendant committed the crime.

Whenever the Commonwealth must prove the defendant's intention to do something, **for example, in this case the intention to burn a dwelling**, you should consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proof. **This remains true even after you determine that the defendant is criminally responsible.**

Likewise, whenever the Commonwealth must prove the defendant's knowledge of any facts or circumstances, you should consider any credible evidence of mental impairment in

determining whether the Commonwealth has met its burden of proof.

More particularly, you may consider any credible evidence of the defendant's mental impairment in determining:

**Whether the defendant willfully and maliciously intended to burn a dwelling, an element of the crime of arson, on which the crime of felony murder depends.**

I reiterate, whenever the Commonwealth must prove that the defendant intended to do something, or had knowledge of certain facts or circumstances, in order to prove the crime, you may consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proving the defendant's intent or knowledge.

### Offenses

#### **§ 2.6 Murder In The Second Degree**

In order to prove murder in the second degree, the Commonwealth must prove the following elements:

1. The defendant caused the death of Crystal Blanchard.
2. The defendant:
  - c. intended to do<sup>1</sup> an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

*general intent*

**Whenever the Commonwealth must prove the defendant's knowledge of any facts or circumstances, you should consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proof.**

*[Note to Judge: Where murder in the first degree with extreme atrocity or cruelty is not charged, the judge must give the detailed instructions for each element of murder in the second degree that are set forth in the instructions for murder in the first degree with extreme atrocity or cruelty.]*

The Commonwealth must prove that the defendant intended to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would result.

Let me help you understand how to analyze this. You must first determine whether the defendant intended to perform the act that caused the victim's death. If you find that he intended to perform the act, you must then determine what the defendant herself actually knew about the relevant circumstances at the time she acted.

**Whenever the Commonwealth must prove the defendant's knowledge of any facts or circumstances, you should consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proof.**

<sup>1</sup> In responses to the defendant's Motion for a Bill of Particulars, the Commonwealth disclaimed any theory of omission of an act, or failure to act, and announced its determination to rely on "That she intentionally started this fire, and by intentionally starting this fire, it resulted in the death of Crystal Blanchard." Transcript of hearing 10/13/15, at 4.

Then you must determine whether, under the circumstances known to the defendant, a reasonable person would have known that the act intended by the defendant created a plain and strong likelihood that death would result.

### § 2.6.1 Felony-Murder in the Second Degree

Next, I will define the elements of felony-murder in the second degree. A defendant is guilty of felony-murder in the second degree if the Commonwealth has proved beyond a reasonable doubt that the victim was killed during the defendant's commission or attempted commission of a felony with a maximum sentence of less than life imprisonment. To prove the defendant guilty of felony-murder in the second degree, the Commonwealth must prove the following elements beyond a reasonable doubt:

1. The defendant committed or attempted to commit a felony with a maximum sentence of less than imprisonment for life.
2. The death occurred during the commission or attempted commission of the underlying felony.
3. The underlying felony was inherently dangerous (or) the defendant acted with a conscious disregard for the risk to human life.

The Commonwealth alleges that the defendant committed Arson. I instruct you that this crime is a felony with a maximum sentence of less than life imprisonment.

In order for you to decide whether an Arson actually occurred in this case, I must instruct you on all elements of this offenses.

In this case, the defendant, Melissa Pfeiffer, is charged with arson. Our state legislature has specifically defined arson in a statute, G.L. c. 266, § 1, that provides in part: Whoever willfully and maliciously sets fire to a dwelling house, whether such dwelling house or other building is the property of himself or another and whether the same is occupied or unoccupied, shall be punished ....

**When a death results from the perpetration or attempted perpetration of the statutory felony of arson, there can be no conviction of felony-murder in the second degree unless the jury finds beyond a reasonable doubt that the arson involved circumstances demonstrating the defendant's conscious disregard of the risk to human life.** <sup>2</sup>

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<sup>2</sup> Commonwealth v. Matchett, 386 Mass. 492, 508 (1982)(instruction required, since extortion a crime that "[M] be committed in way not inherently dangerous to human life.") Similarly, burning an unoccupied and isolated dwelling is still arson and therefore the logic of the Matchett opinion requires this instruction. The defendant submits that the logic of the Matchett rule requires this instruction and forbids removing this question from the jury: that this case presents a jury question on this issue implicating the defendant's rights under the VI and XIV Amendments of the United States Constitution and Article XII of the Declaration of Rights in ways that a case such as Commonwealth v. Bell 406 Mass. 35 (2011)(splashing of gasoline on occupants during course of arson) does not.

**You may consider the defendant's mental condition at the time of the killing, including any credible evidence of mental impairment in determining whether the defendant acted in conscious disregard of the risk to human life.**

**In Felony Murder the act of violence that is an element of the underlying felony may not be the same act that caused the victim's death.<sup>3</sup>**

**Where an act of violence is an element of the underlying felony, you may find felony-murder only if you find an act that is separate and distinct from the violent act that resulted in the victim's death.**

### § 4.3.1 Arson

The Commonwealth must prove three elements beyond a reasonable doubt to prove arson:

First Element: that the defendant set fire to, burned or caused a building to be burned;

Second Element: that the building was a dwelling house, a building adjoining or adjacent to a dwelling house, or a building whose burning resulted in a dwelling house being burned; and

Third Element: that the defendant acted willfully and maliciously.

The first element the Commonwealth must prove beyond a reasonable doubt is that the defendant set fire to, burned or caused to be burned the building in question. This requires that some portion of the building must have actually been on fire and burned. There is, however, no requirement that the building be consumed by the fire or destroyed. Even a charring is sufficient evidence of a burning.

The second element the Commonwealth must prove beyond a reasonable doubt is that the building burned was a dwelling house, a building adjoining or adjacent to a dwelling house, or any building the burning of which results in a dwelling house being burned. The phrase "dwelling house" means and includes "all buildings used as dwellings, such as apartment houses, tenement houses, hotels, boarding houses, dormitories, hospitals, institutions, sanatoria, or other buildings" where people live or reside. It is not necessary that the building be occupied at the time of the burning, but the Commonwealth must prove that the building is capable of being occupied as a dwelling, is adjoining or adjacent to a dwelling house, or is a building the burning of which results in a dwelling house being burned.

<sup>3</sup> The defendant here requests that the Court extend to this case the logic of Commonwealth v. Gunter, 427 Mass. 259 (1998), requiring the independence of the "act of violence" comprising the felony and the act causing the death before felony murder can be found. The defendant contends that while arson is a crime against property the aggravated penalties for the crime of arson compared with the penalties for burnings of non-dwellings indicates that in arson the building acts as a proxy for the person who would be an assault victim. (The Commonwealth's allegation in this case that the same conduct constituted an assault on Paul Pitts buttresses this argument.) To allow for the imposition of felony murder liability in these circumstance without an independent act deprives the defendant of equal protection of the laws and due process of law under the United States Constitution and the Massachusetts Declaration of Rights.

Further, it does not matter if the defendant owned the dwelling house or if it was owned by another.

The third element the Commonwealth must prove beyond a reasonable doubt is that the defendant willfully and maliciously set fire to or caused the building to be burned.

Willfulness and malice are required to constitute the state of mind necessary to commit arson.

The word willfully means that the act was intentional and by design, rather than an act that is thoughtless or accidental. A person acting willfully intends both his or her conduct (**for example, lighting a paper**) and the resulting harm (**the burning of a dwelling**). The requirement of willfulness means that accidentally or negligently caused burnings are *not* arson. **Willfulness means to set a dwelling house on fire, not to light a fire in general.** Commonwealth v. Dung Van Tran, 463 Mass. 8, fn. 21 (2012).

You may consider the defendant's mental condition at the time of the killing, including any credible evidence of mental impairment in determining whether the defendant had the intent to burn a dwelling required in the underlying offense.

*malice*

## § 5.2 Mental Impairments As They Apply To Proof Of Knowledge Or Intent (“Diminished Capacity”)

Whenever the defendant's knowledge or intent must be proved, the defendant's culpability rests upon proof of such knowledge or intent. The Commonwealth must prove the requisite knowledge or intent beyond a reasonable doubt in order to prove that the defendant committed the crime.

Whenever the Commonwealth must prove the defendant's intention to do something, **in this case the intention to burn a dwelling**, you should consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proof.

Likewise, whenever the Commonwealth must prove the defendant's knowledge of any facts or circumstances, you should consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proof.

More particularly, you may consider any credible evidence of the defendant's mental impairment in determining:

**Whether the defendant willfully and maliciously intended to burn a dwelling, an element of the crime of arson, on which the crime of felony murder depends.**

I reiterate, whenever the Commonwealth must prove that the defendant intended to do something, or had knowledge of certain facts or circumstances, in order to prove the crime, you may consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proving the defendant's intent or knowledge.

## § 5.9 Accident

The defendant does not have to prove anything in a criminal trial. The Commonwealth must prove beyond a reasonable doubt every element of the crime charged.

In this case there is evidence that the burning of the dwelling was an accident. You must therefore determine whether the defendant intentionally burned a dwelling or whether the burning of the dwelling that occurred was an accident.

An accident is defined as an unexpected happening that occurs without intention or design on the defendant's part. It means a sudden, unexpected event that takes place without the defendant's intending it. Stated otherwise, an accident is an unintentional event occurring through inadvertence, mistake, or negligence.

If an act is accidental, it is not a crime. When considering the evidence, bear in mind that the defendant does not have to prove anything. The Commonwealth must prove beyond a reasonable doubt that what occurred was not an accident. If the Commonwealth has failed to prove to you beyond a reasonable doubt that what occurred was not an accident, then you must find the defendant not guilty.

### **§ 2.8.1 Alternative Instruction — Involuntary Manslaughter Caused by Wanton or Reckless Conduct**

Wanton or reckless conduct is intentional conduct that created a high degree of likelihood that substantial harm will result to another person. Wanton or reckless conduct involves an affirmative act.<sup>4</sup>

To prove that the defendant is guilty of involuntary manslaughter because of wanton or reckless conduct, the Commonwealth must prove the following elements beyond a reasonable doubt:

1. The defendant caused the victim's death;
2. The defendant intended the conduct that caused the victim's death;
3. The defendant's conduct was wanton or reckless;

I will now discuss each element in more detail. The first element is that the defendant caused the death of Crystal Blanchard. A defendant's act is the cause of Crystal Blanchard's death where the act, in a natural and continuous sequence, results in death, and without which death would not have occurred.

The second element is that the defendant intended the conduct that caused the death. The Commonwealth is not required to prove that the defendant intended to cause the death.

The third element is that the defendant's conduct was wanton or reckless. Wanton or

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<sup>4</sup> In responses to the defendant's Motion for a Bill of Particulars, the Commonwealth disclaimed any theory of omission of an act, or failure to act, (for example, by failure to warn) as a basis of liability and announced its determination to rely on "That she intentionally started this fire, and by intentionally starting this fire, it resulted in the death of Crystal Blanchard." Transcript of hearing 10/13/15, at 4.



reckless conduct is conduct that creates a high degree of likelihood that substantial harm will result to another. It is conduct involving a grave risk of harm to another that a person undertakes with indifference to or disregard of the consequences of such conduct.

Whether conduct is wanton or reckless depends either on what the defendant knew or how a reasonable person would have acted knowing what the defendant knew. If the defendant realized the grave risk created by his conduct, his subsequent act amounts to wanton or reckless conduct whether or not a reasonable person would have realized the risk of grave danger.

Even if the defendant himself did not realize the grave risk of harm to another, the act would constitute wanton or reckless conduct if a reasonable person, knowing what the defendant knew, would have realized the act posed a risk of grave danger to another.

**Whenever the Commonwealth must prove “what the defendant knew”, that is, the defendant's knowledge of any facts or circumstances (here so you can weigh how a reasonable person would have acted on the basis of what the defendant knew) you should consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proof.**

It is not enough for the Commonwealth to prove the defendant acted negligently, that is, in a manner that a reasonably careful person would not have acted.

The Commonwealth must prove that the defendant's actions went beyond negligence and amounted to wanton or reckless conduct as I have defined that term.

### § 4.3 Arson

In this case, the defendant, (defendant/name), is charged with arson. Our state legislature has specifically defined arson in a statute, G.L. c. 266, § 1, that provides in part:

Whoever willfully and maliciously sets fire to, burns, or causes to be burned, [or whoever aids, counsels, or procures the burning of,] a dwelling house, or a building adjoining or adjacent to a dwelling house, or a building by the burning whereof a dwelling house is burned, whether such dwelling house or other building is the property of himself or another and whether the same is occupied or unoccupied, shall be punished ....

#### § 4.3.1 Arson (I)

The Commonwealth must prove three elements beyond a reasonable doubt:

First Element: that the defendant set fire to, burned or caused a building to be burned;

Second Element: that the building was a dwelling house, a building adjoining or adjacent to a dwelling house, or a building whose burning resulted in a dwelling house being burned; and

Third Element: that the defendant acted willfully and maliciously.

The first element the Commonwealth must prove beyond a reasonable doubt is that the defendant set fire to, burned or caused to be burned the building in question. This requires that some portion of the building must have actually been on fire and burned. There is,

however, no requirement that the building be consumed by the fire or destroyed. [FN64]  
Even a charring is sufficient evidence of a burning. [FN65]

The second element the Commonwealth must prove beyond a reasonable doubt is that the building burned was a dwelling house, a building adjoining or adjacent to a dwelling house, or any building the burning of which results in a dwelling house being burned. The phrase “dwelling house” means and includes “all buildings used as dwellings, such as apartment houses, tenement houses, hotels, boarding houses, dormitories, hospitals, institutions, sanatoria, or other buildings” where people live or reside. [FN66] It is not necessary that the building be occupied at the time of the burning, but the Commonwealth must prove that the building is capable of being occupied as a dwelling, is adjoining or adjacent to a dwelling house, or is a building the burning of which results in a dwelling house being burned. [FN67]

Further, it does not matter if the defendant owned the dwelling house or if it was owned by another.

The third element the Commonwealth must prove beyond a reasonable doubt is that the defendant willfully and maliciously set fire to or caused the building to be burned.

Willfulness and malice are required to constitute the state of mind necessary to commit arson. The word willfully means that the act was intentional and by design, rather than an act that is thoughtless or accidental. A person acting willfully intends both his or her conduct **(for example, lighting a match)** and the resulting harm **(burning a dwelling)**.

The requirement of willfulness means that accidentally or negligently caused burnings are *not* arson. **Willfulness means to set a dwelling house on fire, not to light a fire in general.** <sup>5</sup>

**Although an act is intentional, its consequence may be accidental. An accident is defined as an unexpected happening that occurs without intention or design on the defendant's part. It means a sudden, unexpected event that takes place without the defendant's intending it. Stated otherwise, an accident is an unintentional event occurring through inadvertence, mistake, or negligence.**

**You may consider any credible evidence of the defendant's mental impairment in determining: Whether the defendant willfully and maliciously intended to burn a dwelling, an element of the crime of arson.**

#### **[§ Unnumbered: Injury to a Firefighter]**

The Commonwealth alleges that the defendant willfully and maliciously did set fire to a building and that offense resulted in injury to a firefighter.

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<sup>5</sup> The added language is that of the trial judge, clarifying, in response to a confused jury's question, the basic instruction. That language was approved by the Supreme Judicial Court. Commonwealth v. Dung Van Tran, 463 Mass. 8, fn. 21 (2012).

The first element the Commonwealth must prove beyond a reasonable doubt is that the defendant set fire to, burned or caused to be burned the building in question. This requires that some portion of the building must have actually been on fire and burned. There is, however, no requirement that the building be consumed by the fire or destroyed. [FN64] Even a charring is sufficient evidence of a burning. [FN65]

The second element the Commonwealth must prove beyond a reasonable doubt is that the building burned was a dwelling house, a building adjoining or adjacent to a dwelling house, or any building the burning of which results in a dwelling house being burned. The phrase “dwelling house” means and includes “all buildings used as dwellings, such as apartment houses, tenement houses, hotels, boarding houses, dormitories, hospitals, institutions, sanatoria, or other buildings” where people live or reside. [FN66] It is not necessary that the building be occupied at the time of the burning, but the Commonwealth must prove that the building is capable of being occupied as a dwelling, is adjoining or adjacent to a dwelling house, or is a building the burning of which results in a dwelling house being burned. [FN67]

Further, it does not matter if the defendant owned the dwelling house or if it was owned by another.

The third element the Commonwealth must prove beyond a reasonable doubt is that the defendant willfully and maliciously set fire to or caused the building to be burned.

Willfulness and malice are required to constitute the state of mind necessary to commit arson. The word willfully means that the act was intentional and by design, rather than an act that is thoughtless or accidental. A person acting willfully intends *both* her conduct (**for example, lighting a match**) and the resulting harm (**burning a dwelling**).

The requirement of willfulness means that accidentally or negligently caused burnings are *not* arson. **Willfulness means to set a dwelling house on fire, not to light a fire in general.** <sup>6</sup>

**You may consider any credible evidence of the defendant's mental impairment in determining: Whether the defendant willfully and maliciously intended to burn a dwelling, an element of injury to a firefighter.**

**Finally, if you find that the Commonwealth has proved these elements beyond a reasonable doubt, you must also find that this offense resulted in injury to a firefighter.**

### § 3.10.2 Reckless Assault and Battery

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<sup>6</sup> This language is that of the trial judge, clarifying in response to a confused jury's question the basic instruction, and approved by the Supreme Judicial Court. Commonwealth v. Dung Van Tran, 463 Mass. 8, fn. 21 (2012).

Instead of intentional conduct, Assault and Battery can be found that involves reckless conduct that results in bodily injury.

[The defendant is charged with having committed an assault and battery on Paul Pitts. General Laws c. 265, § 13A, provides that “Whoever commits ... an assault and battery upon another shall be punished.”]

In order to prove the defendant guilty of having committed an assault and battery by reckless conduct, the Commonwealth must prove two things beyond a reasonable doubt: First Element: that the defendant engaged in actions that caused physical or bodily injury to (alleged victim/name); and

Second Element: that the defendant's actions amounted to wanton and reckless conduct.

Third Element: The defendant, by committing such assault and battery, causes “serious bodily injury.”

The first element the Commonwealth must prove beyond a reasonable doubt is that the defendant engaged in actions that caused Paul Pitts physical or bodily injury. The Commonwealth must prove that the injury interfered with Paul Pitt's health or comfort. The injury need not be permanent, but must be more than transient and trifling. For example, an act that only shakes up a person or causes only momentary discomfort would be transient and trifling.

The second element the Commonwealth must prove beyond a reasonable doubt is that the defendant's actions were wanton and reckless.

It is not enough for the Commonwealth to prove that the defendant acted negligently — that is, acted in a way that a reasonably careful person would not. It must be shown that the defendant's actions went beyond mere negligence and amounted to recklessness. The defendant acted recklessly if she knew, or should have known, that the conduct involved would likely cause substantial harm to someone, but (he/she) ran that risk rather than alter such conduct.

Thus, it is reckless conduct if a reasonable person, under the circumstances as they were known to the defendant, would have recognized that such actions were so dangerous that substantial injury would very likely result.

**Whenever the Commonwealth must prove the defendant's knowledge of any facts or circumstances (here so you can weigh how a reasonable person would have acted on the basis of what the defendant knew) you should consider any credible evidence of mental impairment in determining whether the Commonwealth has met its burden of proof.**

Assault and battery causing serious bodily injury, defined in G.L. c. 265, § 13A(b)(i), has one element in addition to those required for assault and battery.

The additional element is that the defendant, by committing such assault and battery, causes “serious bodily injury.”

“Serious bodily injury” is defined as bodily injury that results in a permanent disfigurement, loss or impairment of a bodily function, limb or organ, or a substantial risk of death.

### Other Considerations

#### **§ 7.12 Omissions In Police Investigations**

A failure on the part of the Commonwealth to follow standard procedure during the police investigation is a factor you may consider in evaluating the evidence presented in this case. Such a failure may create a reasonable doubt as to the defendant's guilt.

With respect to this factor, you should consider three questions:

- (1) Whether the omitted tests or other actions were standard procedure or steps that would otherwise normally be taken under the circumstances;
- (2) Whether the omitted tests or actions could reasonably have been expected to lead to significant evidence of the defendant's guilt or innocence; and
- (3) Whether the evidence provides a reasonable and adequate explanation for the omission of the tests or other actions.

If you find that any omissions in the investigation were significant and not adequately explained, you may consider whether the omissions tend to affect the quality or reliability of the evidence presented by the Commonwealth. Alternately, you may consider whether the omissions tend to show the existence of police bias against the defendant in conducting the investigation.

All of these considerations involve factual determinations that are entirely up to you, and you are free to give this matter whatever weight, if any, you deem appropriate based on all the circumstances.

#### **[§ Unnumbered:] Third Party Culpit.**

**A defendant may introduce evidence that tends to show that another person committed the crime or had the motive, intent, and opportunity to commit it. This evidence may create a reasonable doubt as to a defendant's guilt.**

**However the presence of this evidence does not shift to the defendant any burden to prove another person guilty beyond a reasonable doubt.**

**The ultimate issue before you is whether the Commonwealth has proven the defendant guilty beyond a reasonable doubt. That burden never shifts to the defendant.**

#### **§ 7.7.2 Admissible Only for Limited Purpose**

The defendant is not charged with committing any crime other than the charge contained in the complaint. You have heard mention of other acts allegedly done by the defendant. You may not take that as a substitute for proof that the defendant committed the crime charged, nor may you consider it as proof that the defendant has a criminal personality or bad character.

However, you may consider it solely on the limited issue of the nature of the relationship between Ms. Pfeiffer and William Brewer.

You may not consider this evidence for any other purpose. Specifically, you may not use it to conclude that if the defendant committed the other act, (he/she) must also have committed this charge.

## § 6.6 Expert Witness

There is one more point about witnesses to address: expert witnesses. This term refers to witnesses who have specialized training or experience in a particular field. Generally, in cases that are tried in our courts, both civil and criminal, witnesses may testify only to facts that are within their own personal knowledge—that is, things that they have personally seen or heard or felt. However, in a variety of cases, issues arise that are beyond the experience of lay persons, and in those types of cases, we allow a person with specialized training or experience, called an expert witness, to testify, and to testify not only to facts, but also to opinions, and the reasons for his or her opinions, on issues that are within the witness's field of expertise and are relevant and material to the case.

Because a particular witness has specialized training and experience in his or her field does not put that witness on a higher level than any other witness, and you are to treat the so-called expert witness just like you would treat any other witness. In other words, as with any other witness, it is completely up to you to decide whether you accept the testimony of an expert witness, including the opinions that the witness gave. It is also entirely up to you to decide whether you accept the facts relied on by the expert and to decide what conclusions, if any, you draw from the expert's testimony. You are free to reject the testimony and opinion of such a witness, in whole or in part, if you determine that the witness's opinion is not based on sufficient education and experience or that the testimony of the witness was motivated by some bias or interest in the case. You must also, as has been explained, keep firmly in mind that you alone decide what the facts are. If you conclude that an expert's opinion is not based on the facts, as you find those facts to be, then you may reject the testimony and opinion of the expert in whole or in part.

You must remember that expert witnesses do not decide cases; juries do. In the last analysis, an expert witness is like any other witness, in the sense that you alone make the judgment about how much credibility and weight you give to the expert's testimony, and what conclusions you draw from that testimony.

## [§ Unnumbered] (Defendant's submission): Hindsight Bias

When people with hindsight knowledge of outcomes make judgments about the predictability or foreseeability of past events they sometimes fall victim to the basic human tendency to exaggerate the likelihood of a given outcome as it would have been seen from a

past vantage point.<sup>7</sup> You should be careful to avoid the influence of hindsight in making judgments about foreseeability.

Respectfully submitted,  
MELISSA PFEIFFER,  
By her counsel:

/s/: \_\_\_\_\_  
James M. Doyle, 553716  
Bassil, Klovee & Budreau  
20 Park Plaza, No. 1005  
Boston, MA 02116  
617 686 0275

CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Motion was served by electronic mail on the office of Julie Higgins, Esq., Assistant District Attorney, this 5<sup>th</sup> day of February 2016.

/s/: \_\_\_\_\_  
James M. Doyle

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<sup>7</sup> Hindsight bias is a universally recognized universal human cognitive bias suitable for inclusion in a cautionary instruction. See, Commonwealth v. Gomes, 470 Mass. 352, 379-388 (2015)(proposed instruction incorporating psychological warnings about the functioning of eyewitness memory.)

The defendant submits and serves with these requested instructions an electronic copy of Jeffrey Rachlinsky, *A Positive Psychological Theory Of Judging In Hindsight*, 65 U.CHI.L.REV. 571 (1998). For other authority, see, generally, Erin Harley, *Hindsight Bias in Legal Decision-Making*, 25.1 SOCIAL COGNITION 48 (2007); Reid Hastie, et al., *Juror judgments in civil cases: Hindsight effects on judgments of liability for punitive damages*, 23 L. & HUMAN BEHAVIOR 597 (1999); Hartmut Blank, et al., *Hindsight Bias: On being wise after the event*, 25.1 SOCIAL COGNITION 43 (2007); Neal Rose, *Hindsight Bias*, 7.5 PERSPECTIVES ON PSYCHOLOGICAL BIAS 411 (2012); K. Henrikson, et al., *Hindsight Bias, Outcome Knowledge and Adaptive Learning*, 12 QUALITY/SAFETY HEALTHCARE 41 (2003).

SUFFOLK, ss:

SUPERIOR COURT DEPT.  
NO. SUCR-2011-10211

COMMONWEALTH

V.

MELISSA PFEIFFER

MOTION FOR REQUIRED FINDING

Defendant, Melissa Pfeiffer, respectfully moves this honorable Court for a  
Required Finding of not guilty, on the grounds that the evidence is insufficient as to each  
of the pending indictments. Commonwealth v. Latimore, 378 Mass. 671 (1979).

Respectfully submitted,  
MELISSA PFEIFFER,  
By her counsel:

  
James M. Doyle, 553716  
Bassil, Klovee & Budreau  
20 Park Plaza, No. 1005  
Boston, MA 02116  
617 686 0275

*Defendant explained in court  
2/19/16*



SUFFOLK, ss:

SUPERIOR COURT DEPT.  
NO. SUCR-2011-10211

COMMONWEALTH

V.

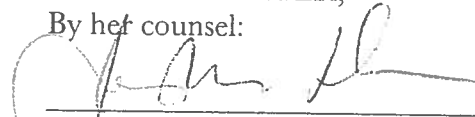
MELISSA PFEIFFER

MOTION FOR REQUIRED FINDING*(at the close of the evidence)*

Defendant, Melissa Pfeiffer, respectfully moves this Honorable Court for a

Required Finding of not guilty, on the grounds that the evidence is insufficient as to each  
of the pending indictments. Commonwealth v. Latimore, 378 Mass. 671 (1979).*Done  
J. Anderson  
2/5/16*Respectfully submitted,  
MELISSA PFEIFFER,

By her counsel:

James M. Doyle, 553716  
Bassil, Klovee & Budreau  
20 Park Plaza, No. 1005  
Boston, MA 02116  
617 686 0275*Upon remand motion, this court concludes that there is  
insufficient evidence and no legal basis for the ABDW  
charge (indictment No. 3) so that the motion is ALLOWED  
as to that count  
Tr. Lat. 2/16/16*

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK S.S.

Superior Court Department - Criminal

January 2016, SITTING

Commonwealth of Massachusetts

vs

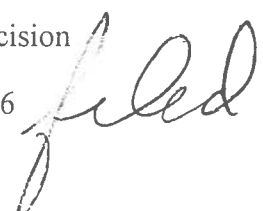
Melissa Pfeiffer

VERDICT SLIPSUCR 2011 - 10211 - 001 Murder, 2<sup>nd</sup> Degree

In the above-entitled case, we the jury say that the defendant is

1. \_\_\_\_ Not Guilty of Offense as charged
2. \_\_\_\_ Not Guilty by Reason of Lack of Criminal Responsibility
3. ☒ Guilty of Offense as charged
  - ☒ Theory of Felony Murder
  - \_\_\_\_ Theory of Murder with Malice
4. \_\_\_\_ Guilty of Lesser Included Offense of: Involuntary Manslaughter

And this is our unanimous decision

Date: February 10, 2016Elise A. O'Hara  
Foreperson

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK S.S.

Superior Court Department - Criminal

January 2016, SITTING

Commonwealth of Massachusetts

vs

Melissa Pfeiffer

VERDICT SLIP

SUCR 2011 - 10211 - 003 Arson (Dwelling)

In the above-entitled case, we the jury say that the defendant is

1. ☐ Not Guilty of Offense as Charged
2. ☐ Not Guilty by Reason of Lack of Criminal Responsibility
3. ☒ Guilty of Offense as charged

And this is our unanimous decision

Date: February 10, 2016

*filed*

Elise A. O'Hara  
Foreperson

## COMMONWEALTH OF MASSACHUSETTS

SUFFOLK S.S.

Superior Court Department - Criminal

January 2016, SITTING

Commonwealth of Massachusetts

vs

Melissa Pfeiffer

VERDICT SLIP

SUCR 2011 - 10211 #004 Firefighters Injuries from Criminal Offenses - Robert Brown

In the above-entitled case, we the jury say that the defendant is

1. ☐ Not Guilty of Offense as charged
2. ☐ Not Guilty by Reason of Lack of Criminal Responsibility
3. ☒ Guilty of Offense as charged

And this is our unanimous decision.

Date: February 10, 2016*filed*Elise A. O'Hara  
Foreperson

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK S.S.

Superior Court Department - Criminal

January 2016, SITTING

Commonwealth of Massachusetts

vs

Melissa Pfeiffer

VERDICT SLIP

SUCR 2011 - 10211 #005 Firefighters Injuries from Criminal Offenses - Wayne Ulwick

In the above-entitled case, we the jury say that the defendant is

1. ☐ Not Guilty of Offense as charged
2. ☐ Not Guilty by Reason of Lack of Criminal Responsibility
3. ☒ Guilty of Offense as charged

And this is our unanimous decision.

Date: February 10, 2016

*filed*

Elise A. O'Hara  
Foreperson

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SUFFOLK, ss:

2016 MAR 16 PM 2: 28

SUPERIOR COURT DEPT.

NO. SUCR-2011-10211

COMMONWEALTH

V.

MELISSA PFEIFFER

POST-VERDICT MOTION FOR REQUIRED FINDING

Defendant, Melissa Pfeiffer, respectfully moves this honorable Court pursuant to Mass.R.Cr.P. 25 (b)(2) for a Required Finding of not guilty, on the grounds that 1) the evidence is insufficient as to each of the indictments that depend on a finding of arson. Commonwealth v. Latimore, 378 Mass. 671 (1979), or, 2) in the alternative, for a new trial.

As grounds for this motion, counsel states as follows under penalties of perjury:

1. Following the return of a verdict of guilty of felony murder in the second degree and associated offenses the Court set the date of March 21, 2016 for sentencing and post-verdict motions, and extended the time for filing post-verdict motions in light of that date. The court also invited the filing of a Memorandum in Aid of Sentencing. That Memorandum is filed separately from and simultaneously with this motion.

2. Taking the evidence in the light most favorable to the prosecution the jurors could have found beyond a reasonable doubt that Ms. Pfeiffer intentionally placed a lighted paper on clothing of William Brewer, thereby starting the fire that destroyed the dwelling and claimed the life of the decedent and took no *effective* action to extinguish or cause others to extinguish the fire.

Denud  
Gunderson  
3/21/16

3. Conviction for the offense of arson, however, requires that the defendant act willfully and maliciously either in starting the fire or in failing to act to extinguish the fire, and that in either acting or failing to act the defendant must have had the *object* of burning a dwelling. No reasonable juror could have found beyond a reasonable doubt that the defendant had the object of burning a dwelling. Commonwealth v. Latimore, 378 Mass. 671 (1979). Because the offense of felony murder depends on sufficient evidence of arson, and because the defendant was not convicted under any other theory of murder, the appropriate verdict is one of manslaughter.

4. There was no evidence to indicate that the defendant ignited the paper with any other object than to burn William Brewer's clothing. There was substantial uncontroverted evidence that such an object was against the defendant's own interests and served no purpose of the defendants. Pfeiffer had little or no contact with, and no animus toward, her neighbors or landlord. She had been homeless for some time prior to securing the Spruce Street apartment, and had reluctantly surrendered custody of her older son because of the challenges to parenting presented by her homeless status. Everything she owned was in the apartment. Everything her son owned was in the apartment. Had the defendant thought of burning her apartment it is certain that her first thought would have been that to lose the home and revert to homelessness would jeopardize her custody of her younger son. Witnesses were unanimous that Ms. Pfeiffer was a loving and attentive mother.

5. The second theory of liability, that a defendant has committed arson if he or she accidentally starts a fire, and then “willfully and maliciously makes no attempt to extinguish it or to report it”<sup>1</sup> was not properly before the jury.

The defendant had moved for a Bill of Particulars regarding the murder count. The Commonwealth responded that it intended to proceed on a theory of felony murder. That motion raised explicitly the question of which of the two potential theories of liability formed the basis of the murder indictment. At the October 13, 2015 hearing on that motion before Judge Locke, the question of which theory the prosecution would proceed on was explicitly addressed.

MR. DOYLE: . . . Arson could arguably be committed in two ways: one by setting a fire, and one by allowing an ongoing fire to go forward. I understand the Commonwealth to be representing that it is in terms of setting the fire that it is premising liability.

\* \* \*

THE COURT: Why can't I endorse the motion that there is no action necessary based on the Commonwealth's representation that it will proceed on second degree murder on a theory of felony murder, the underlying felony being the intentional setting of a fire to an occupied dwelling?

MR. DOYLE: As long as the language makes it clear that it's the setting of the fire, not the failing to act after a fire --

THE COURT: That's what I've just heard. Ms. Higgins?

MS. HIGGINS: Correct, she intentionally set the fire. That's our position. (Tr. 10/13/2015, at 5-6).

On the basis of these representations, Judge Locke endorsed the motion. That ruling,

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<sup>1</sup> This is the language of the Court's charge to the jury as provided to counsel, at p. 19.



confining the Commonwealth to the “lighting the fire” theory of liability, was the “law of the case.” If there were an objection to that ruling, it should have been appealed. The addition of the “failure to act” theory at trial was unlawful and violated the defendant’s right to due process of law and the XIVth Amendment to the Constitution of the United States and under Massachusetts Declaration of Rights.

Moreover, even if the “failure to extinguish it or report it” theory were properly before the jury, no rational juror could find the defendant guilty on that theory. The evidence was clear that Ms. Pfeiffer *did* warn the first person she encountered (William Brewer), who then attempted to warn others, and was almost immediately joined by bystanders attempting to do the same. The evidence also indicated that having fled the apartment, Pfeiffer had no cellphone or other means to warn others. The defendant’s account to the police of the onset of awareness of the fire, which was consistent with the forensic narrative of a smoldering fire bursting suddenly into a violent and uncontrollable blaze, made it clear that action to extinguish the blaze was not available. The crime of arson cannot be satisfied by the defendant’s failure to make *ineffective* gestures toward fighting an uncontrollable blaze, or to add her voice to the chorus of others, like Mr. Brewer, already banging on doors and yelling. Nor can arson satisfied by requiring that a defendant take *effective* action when the evidence makes it clear that no effective action was available. The undisputed evidence of Ms. Pfeiffer’s cognitive limitations and the impact of her long history of trauma on her mental processing abilities simply reinforce this conclusion.

6. As the defendant has argued previously in her requested instructions, the logic of Commonwealth v. Gunter, 427 Mass. 259 (1998), requiring the independence of the “act of violence” comprising the felony and the act causing the death before felony

murder can be found governs here. No rational juror could have found the underlying act and the act causing death were independent here. Commonwealth v. Latimore, 378 Mass. 671 (1979). The defendant contends that while arson is a crime against property the aggravated penalties for the crime of arson when compared with the penalties for burnings of non-dwellings indicate that in arson the igniting agent (here, allegedly a piece of paper) acts a weapon and the building (because it is a dwelling) acts as a proxy for the person or persons who would be an assault victim. (The Commonwealth's allegation in this case that the same conduct constituted an assault on Paul Pitts buttresses this argument.) To allow for the imposition of felony murder liability in these circumstances without an independent act deprives the defendant of equal protection of the laws and due process of law under the United States Constitution and the Massachusetts Declaration of Rights.

7. Finally, this case well-illustrates why using a felony murder theory in imposing capital liability in a homicide case of unintended killing is constitutionally impermissible under the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States, and should be abandoned as an element of the common law of Massachusetts. Even apart from the compelling reasons that have led a majority of states to discard the felony murder construct, the uncontroverted nature of the defendant's cognitive and other limitations<sup>2</sup> implicate the numerous other academic and other writings attacking the application of the felony murder rule to juvenile offenders. See, e.g., Erin H. Flynn, *Dismantling the Felony Murder Rule: Juvenile Deterrence and Retribution* *Post Roper v. Simons*, 156 U.PENN.L.REV. 1049 (2008) and authorities cited therein.

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<sup>2</sup> See, reports of Dr. Frank DiCataldo and Dr. Alison Fife submitted simultaneously with this motion with Memorandum in Aid of Sentencing.

8. For all of the foregoing reasons the motion for required finding should be granted as to the arson and arson-dependent indictments. Should this Court decide to preserve the felony murder conviction, the underlying arson conviction is merged into the felony murder conviction. Commonwealth v. Mello, 420 Mass. 375, 398 (1995).

Respectfully submitted:  
MELISSA PFEIFFER,  
By her counsel:

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James M. Doyle, 553716  
Bassil, Klovee & Budreau  
20 Park Plaza, No. 1005  
Boston, MA 02116  
617 686 0275

CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Reply Memorandum was served by hand on the office of Julie Higgins, Esq., Assistant District Attorney on the \_\_\_\_the day of March, 2016.

---

James M. Doyle

SUFFOLK, ss:

SUPERIOR COURT DEPT.  
NO. SUCR-2011-10211

COMMONWEALTH

V.

MELISSA PFEIFFER

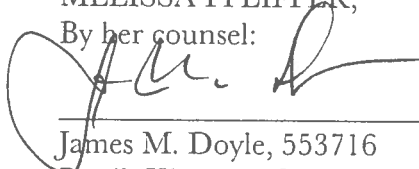
NOTICE OF APPEAL

Defendant, Melissa Pfeiffer pursuant to Mass.R.App.P. 3, having been aggrieved by certain rulings of the trial court, hereby appeals the conviction and judgment entered on March 21, 2016.

Respectfully submitted:

MELISSA PFEIFFER,

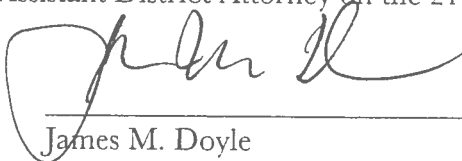
By her counsel:



James M. Doyle, 553716  
Bassil, Klovee & Budreau  
20 Park Plaza, No. 1005  
Boston, MA 02116  
617 686 0275

CERTIFICATE OF SERVICE

This will certify that a true copy of the foregoing Reply Memorandum was served by hand on the office of Julie Higgins, Esq., Assistant District Attorney on the 21<sup>st</sup> day of March, 2016.



James M. Doyle

3/21/16 L.O.D.